Query
Negotiability
of bills &
Loans?

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Jan. 1888

TRANSCRIPT OF RECORD.

PHILADELPHIA BAR ASSOCIATION

SUPREME COURT OF THE UNITED STATES.

No. 157.

HUGH SHAW AND DAVID RESE ESREY, PLAINTIFFS IN ERROR,

vs.

THE MERCHANTS' NATIONAL BANK OF SAINT LOUIS.

P. H. Co.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Shoup

FILED JULY 18, 1877.

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1 UNITED STATES,
Eastern District of Pennsylvania, set:

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between the Merchants' National Bank of St. Louis, a citizen of the State of Missouri, plaintiff, and Hugh Shaw and David Reese Esrey, trading as Shaw and Esrey, citizens of the State of Pennsylvania, defendants, in a plea of replevin for one hundred and forty-three bales of cotton, of the value of nine thousand and three hundred dollars ($9,300), a manifest error has intervened, to the great damage of the said Hugh Shaw and David Reese Esrey, trading as Shaw and Esrey, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this ninth day of June, A. D. one thousand eight hundred and seventy-six, and in the one hundredth year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk of Circuit Court U. S.

2 The United States of America to the Merchants' National Bank of St. Louis, a citizen of the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Hugh Shaw and David Reese Esrey, trading as Shaw and Esrey, citizens of the State of Pennsylvania, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 19th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

W. MCKENNAN,
Cir. Judge.

3 We accept service of the above for "The Merchants' National Bank of St. Louis," and request the clerk to enter our appearance for said defendants in error.

ROBT. N. WILLSON,
GEO. JUNKIN, *Att'ys, &c.*

AUG. 1st, 1876.

(Indorsed:) No. 79. October 18, '74. Merchants' National Bank of St. Louis v. Shaw & Eserey. Copy of citation.

REC. 157—1

4 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. October session, 1874.

MERCHANTS' NATIONAL BANK OF ST. LOUIS, a citizen of the State of Missouri,
vs.
HUGH SHAW AND DAVID REESE ESREY, trading as Shaw and Esrey, citizens of the State of Pennsylvania. } No. 79.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. Of October session, 1874. No. 79.

It is thus contained:

Be it remembered that on the twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-four, the Merchants' National Bank of St. Louis, a citizen of the State of Missouri, by
5 Robert N. Willson and George Junkin, esquires, its attorneys, comes into court here and sues forth therefrom a writ of replevin against Hugh Shaw and David Reese Esrey, trading as Shaw and Esrey, citizens of the State of Pennsylvania, which said writ being returned and filed, is in the words and of the tenor following, to wit:

6 UNITED STATES,
Eastern District of Pennsylvania, sct:

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you cause to be replevied and delivered unto Merchants' National Bank of St. Louis, a citizen of the State of Missouri, if it shall make you secure in prosecuting its claim against one hundred and forty-three bales of cotton, of the value of nine thousand three hundred dollars, which Hugh Shaw and David Reese Esrey, copartners trading as Shaw and Esrey, citizens of the State of Pennsylvania, took and unjustly detain against sureties and safe pledges. And that you put the said Hugh Shaw and David Reese Esrey, as copartners trading aforesaid, by sureties and safe pledges, so that they be and appear before the judge of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Philadelphia on the first Monday of January next, to answer to the said Merchants' National Bank of St. Louis of a plea wherefore they took the goods and chattels aforesaid, the property of the said Merchants' National Bank of St. Louis, and unjustly detain the same against sureties and safe pledges. And have you then there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twelfth day of December, A. D. 1874, and in the ninety-ninth year of the Independence of the said United States.

[SEAL C. C. U. S., E. D. OF PA.] SAMUEL BELL,
Clerk Cir. Ct. U. S., E. D. of Pa.

Which said writ is endorsed as follows:

7 DEC. 12TH, 1874.

Replevied as within commanded one hundred and one bales of cotton, being part of the property named in the within writ, and summoned the defendants; property bond entered by the defendants, and property so replevied delivered to the defendant.

The residue of the property within named were eloigned.

So answers—

JAMES N. KERNS,
U. S. Marshal,
Pr. C. McCORMICK,
S. Deputy.

(Indorsed:) No. 79. October session, 1874. Merchants' National Bank of St. Louis vs. Hugh Shaw et al. Writ of replevin. Filed 21st December, 1874.

8 And afterwards, to wit, on the *on the* twenty-fourth day of February, in the year of our Lord one thousand eight hundred and seventy-five, the said plaintiffs, by their said attorneys, come into our said court here and file their declaration, which, being read and filed, is as follows, to wit:

No. 79. October sessions, 1874.

Hugh Shaw and David Reese Esrey, copartners trading as Shaw and Esrey, and citizens of the State of Pennsylvania, were summoned to answer the Merchants' National Bank of St. Louis, Missouri, a body corporate, incorporated under the laws of the United States, and a citizen of the State of Missouri, the plaintiff in this suit, of a plea wherefor they took the goods and chattels, &c., of the said plaintiff, the Merchants' National Bank of St. Louis, Missouri, and unjustly detained the same against sureties and pledges until, &c., and whereupon the said plaintiff, by Robert N. Willson and George Junkin, his attorneys, com-

9 plains for that the said defendants, Hugh Shaw and David Reese Esrey, copartners trading as Shaw and Esrey, heretofore, to wit, on the first day of December, A. D. one thousand eight hundred and seventy-four, at the city of Chester, in the district aforesaid, took the goods and chattels aforesaid, to wit, one hundred and one bales of cotton of the said plaintiff, of great value, to wit, of the value of six thousand five hundred and seventy dollars, and unjustly detained the same against sureties and pledges, and the same still do detain against sureties and pledges.

For that whereas also the said defendants, Hugh Shaw and David Reese Esrey, copartners trading as Shaw and Esrey, heretofore, to wit, on the first day of December, A. D. one thousand eight hundred and seventy-four, at the city of Chester, in the district aforesaid, took the goods and chattels aforesaid, to wit, one hundred and forty-three bales of cotton, of great value, to wit, of the value of nine thousand three hundred dollars, and unjustly detained the same against sureties and

10 pledges, and the same still do detain against sureties and pledges.

Wherefore the said plaintiff saith that the said plaintiff, the Merchants' National Bank of St. Louis, Missouri, is injured and hath sustained damage to the value of twenty-five thousand dollars; and therefore the said plaintiff brings this suit.

ROBERT N. WILLSON,
GEORGE JUNKIN,
For Pl'ffs.

11 And afterwards, to wit, on the twenty-seventh day of February, in the year last aforesaid, the said defendants, Hugh Shaw and David Reese Esrey, copartners trading as Shaw and Esrey, by William Henry Lex, John B. Hinckson, and George W. Thorn, esquires, their attorneys, come into court here and file their pleas, which said pleas are as follows, to wit:

Defendants plead "Non cepit and property."

12 And afterwards, to wit, on the twentieth day of March, in the year last aforesaid, the said plaintiffs, by their attorneys aforesaid, come and file their replication to the said defendants' plea, which said replication is as follows, to wit:

And the said plaintiff, as to the first plea by the said defendants pleaded, and whereof he hath put himself upon the country, doth the like, and issue.

And the said plaintiff, as to the second plea by the said defendants pleaded, replies, and says that the said defendants have not and never had any property in the goods and chattels in the declaration mentioned, and issue.

13 And afterwards, to wit, on the nineteenth day of April, in the year last aforesaid, by leave of court first had and obtained, the said defendants, by their attorneys, come and plead as follows, to wit:

CITY AND COUNTY OF PHILADELPHIA, *ss:*

And the said defendants, by W. H. Lex, J. B. Hinckson, and George W. Thorn, their attorneys, come, &c., and say that they did not take or detain the said goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiffs above has thereof complained against them; and of this the defendants put themselves upon the country, &c.

And for a further plea the defendants say that the property of the said goods and chattels in the said declaration mentioned at the said time when, &c., was in them the said defendants, without this, that the property of the said goods and chattels, or any part thereof,

14 at the said time when, &c., was in the said plaintiffs, as by the said declaration is above supposed, and this the defendants are ready to verify; wherefore they pray judgment.

15 Whereupon, upon the same day, the said plaintiffs, by their said attorneys, come into court here and reply as follows, to wit:

As to the plea second pleaded by the defendants, in which they say that the property of the said goods and chattels in the said declaration mentioned was not in the said defendants in manner and form as in the said plea alleged, and this they pray may be inquired of by the country, &c.

16 Whereupon, upon the same day, a jury being called come, &c., to wit:

1. Lewis Wills.
2. Francis Parkinson.
3. Joseph P. Ketch.
4. Archibald Graham.
5. William H. Harvey.
6. Henry C. Rohm.
7. John F. McMullin.
8. Henry A. Fisher.
9. Samuel Glading.
10. Joseph W. Johnson.
11. Robert Granlees.
12. Warren Hale.

Who are respectively sworn and affirmed to try the issues joined, &c.

Whereupon, afterwards, to wit, on the twenty-second day of April, A. D. 1875, the jurors aforesaid, on their oaths and affirmations aforesaid, find for the plaintiff, and that the value of the goods replevied is six thousand four hundred and ninety $\frac{36}{100}$ dollars ($6,490\frac{36}{100}$), and assess the damages at that amount with costs.

17 And afterwards, to wit, on the twenty-sixth day of April, in the year last aforesaid, the said defendants, by their attorneys aforesaid, come and move the court for a new trial, and assign their reasons therefor, which, being filed, are as follows, to wit:

And now, April 24, 1875, the defendants move for a new trial, and by leave of the court, without waiver of any of the exceptions taken at the trial, being first had, assign the following reasons:

I. Because there was no evidence in the cause to explain how the possession of the bill of lading was parted with by the plaintiffs or their agent.

II. For that there was no evidence on the trial to contradict the oath of the defendants and of Andrew H. Miller, that they respectively had no knowledge of any fact that would impeach the title of Kuhn &
18 Bro. to the bill of lading at the time of the sale thereof to said Miller.

III. That it was clearly proved by Andrew H. Miller that he advanced the sum of $8,500 upon the credit of the bill of lading in good faith without knowledge of any fact which tended to impeach its validity.

IV. For that the learned judge charged the jury as follows, to wit: "That the bill of lading was improperly detached, and found its way to the most improper person to have possession, the residuary owner who had no property in it until the draft was paid, seems clear," when there was no evidence on which the fact assumed in the charge could properly be left to the jury.

V. For that the court erred in charging the jury as follows, to wit: "The true rule is that if Mess. Miller & Bro., in the ordinary course of business made, the advance on the credit of the bill of lading, without any reason to suspect the honesty of Kuhn and Brother, they
19 might acquire a better title than the plaintiffs. But it is a different question as to doubting as to the validity of the title of Kuhn & Bro. and as to doubting the validity of the transfer between the parties themselves. The jury will no doubt believe that Kuhn had committed an infamous fraud in a recent transaction, and that Mess. Miller & Bro. knew it. If there is any doubt as to this transaction the jury will give the benefit of it to Mess. Miller," which left to the jury to determine the question of the validity of the transfer of the bill of lading by reference to the belief of the honesty or dishonesty of Kuhn.

VI. Because the learned judge charged the jury that if the transaction was a fraud the telegraphing to St. Louis was all right as to that end of the line, but that the jury will probably think that the ommission to inquire at this end needs explanation.

VII. For that the court erred in the answer to the defendants'
20 first point, which point and answer were as follows:

POINT.—If the jury believe from the evidence that the 170 bales of cotton marked W. D. I., and that the 141 bales replevied from defendants were a part thereof, were delivered to Mess. Miller & Bro. by the railroad company on production of the original bill of lading, then their verdict should be for the defendant.

Answer. This proposition is affirmed subject to the question whether Miller & Brother had a title valid as against the plaintiff. If they had, the proposition is correct; otherwise it cannot be affirmed.

VIII. For that the court erred in the answer to the defendants' second point, which point and answer were as follows:

POINT.—If the jury believe from the evidence that the defendants were innocent purchasers for value from Messrs. Miller & Brother, then their verdict should be for defendants.

Answer. This proposition is correct if the title of Miller &
21 Brother was valid as between them and the plaintiff. But if their title was not valid as against the plaintiff they could not transfer any better title than they themselves had. Therefore if the jury find that the defendants did not see the bill of lading or any other muniment of title, their innocence and payment of value did not protect them against the suit of the plaintiff unless the title of Miller and Brother was valid as against the plaintiff.

IX. For that the court erred in the answer to the defendants' third point, which point and answer were as follows:

POINT.—If the jury believe from the evidence that the bill of lading in the hands of the bank was marked duplicate, and that the original was in the hands of Mess. Miller and Brother, then their verdict should be for defendants.

Answer. If the jury so believe and the original was fairly received by Miller & Brother for values, the verdict should be for defendants. Without this qualification the proposition cannot be affirmed.

22 X. For that the court erred in the answer to the defendants' fourth point, which point and answer were as follows:

POINT.—That the plaintiffs, being a national bank, cannot acquire such a title to the cotton as will enable them to maintain an action in replevin, and therefore the verdict should be for the defendants.

Answer. The act of Congress of June 3rd, 1864, empowered a national bank to exercise all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating notes, drafts, and bill of exchange, and also by buying and selling exchange. It is incidental to such dealing in exchange to take the bill of lading against which a bill of exchange is drawn as a security for the bill of exchange if discounted by the bank. The instruction is therefore refused.

XI. For that the court erred in the answer to the defendants' fifth point, which point and answer were as follows:

23 POINT.—That under all the evidence the verdict should be for the defendants.

Answer. This instruction is refused.

XII. For that the court erred in the answer to the defendants' sixth point, which point and answer were as follows:

POINT.—If the jury believe from the evidence that the bill of lading was attached to the draft as collateral pending its acceptance, then Kuhn & Bro. had the right to detach the bill of lading after they had accepted, and Miller & Bro.'s dealings with the bill of lading were legal, and by it they obtained a good title to the cotton, and therefore the verdict should be for the defendants.

Answer. I cannot affirm the right of Kuhn & Bro. to detach the bill of lading when they accepted the draft, unless the holder of the draft assented to their doing so.

XIII. For that the court erred in the answer to the defendants' seventh point, which point and answer were as follows:

POINT.—If the jury believe from the evidence that the bill of
24 lading was attached to the draft, then upon acceptance of the draft by Kuhn & Bro., they had the right to the bill, and if the jury find that Miller & Bro. were bona fide purchasers of the bill of lading from Kuhn & Bro. without notice of any defect of title in them, the verdict should be for the defendants.

Answer. This proposition taken as a whole cannot be affirmed.

XIV. For that the court erred in the answer to the defendants' eighth point, which point and answer were as follows:

POINT.—That all the evidence in this suit touching or relating to a bill of lading purchased by Miller & Brother, from M. Kuhn & Bro., on Oct. 27 or Oct. 28, 1874, is irrelevant and has no bearing on the issues raised in the present suit.

Answer. This part of the evidence in the cause has no bearing on the issues except under the question of the fairness and honesty of
25 the transaction on the part of Miller & Bro. But on the point thus excepted the evidence is for the consideration of the jury.

XV. For that the court erred in the answer to the defendants' ninth point, which point and answer were as follows:

POINT.—There is no fact proved in this case that in any way affects the title of Miller Bro. to the bill of lading for the goods which are the subject of this suit, and the verdict should therefore be for the defendants.

Answer. This instruction is refused.

XVI. For that the court erred in the answer to the defendants' tenth point, which point and answer were as follows:

POINT.—That there is no evidence in this cause which shows or tends to show that Miller & Bro. had any knowledge of any defect in the title of Kuhn & Bro. to the bill of lading for the goods for which this suit has been brought.

Answer. The title of Miller & Brother was valid as between them and Kuhn & Brother. Moreover, the instruction asked in the form
26 in which it is expressed may be given. Miller & Brother had no knowledge, so far as appears from the evidence, that the title of Kuhn & Brother was in any respect defective. The question is, however, whether Miller & Bro. had such reasonable ground to suspect the honesty of Kuhn and Brother in such a transaction that Miller & Brother could acquire from Kuhn & Brother on the faith of the bill of lading a better title than Kuhn & Brother had.

XVII. For that the court erred in the answer to the defendants' eleventh point, which point and answer as follows:

POINT.—That under the evidence in this cause, Miller & Bro. were bona fide purchasers of the bill of lading for the goods which are the subject of this suit, and their sale of the goods passed a good title to them to the defendants.

Answer. This instruction, in the absolute form in which it is requested, is refused.

XVIII. For that the court erred in the answer to the defendants' twelfth point, which point and answer were as follows:

27 POINT.—That if the jury believe from the evidence that the defendants were purchasers of the goods in question from Miller & Bro. for value, without notice of any equity in the plaintiffs, and had paid for the same either in whole or in part before the institution of this suit, the verdict must be for the defendants.

Answer. This proposition is correct if Miller & Brother's title was

valid as against the plaintiff. Unless it was thus valid the proposition cannot be affirmed.

XIX. For that the court erred in the answer to the defendants' thirteenth point, which point and answer were as follows:

POINT.—That if the defendants paid any portion of the purchase money of the goods in good faith before notice of the writ of replevin in this suit, the verdict must be for the defendant.

Answer. This proposition is correct if the title of the sellers was valid as against the plaintiff. The instruction without this qualification is refused.

XX. For that the court erred in the answer to the defendants' fourteenth point, which point and answer were as follows:

28 POINT.—That the jury are to decide the issues raised by the pleadings in this case, and are not to determine the merits of any previous transactions between Kuhn & Bro. and Miller & Bro.

Answer. This proposition is affirmed with the following qualification only: The jury may consider the merits or demerits of the previous transactions so far as it bears upon the question of the fairness of the conduct of Miller & Bro. in the transaction in question, but no farther.

XXI. For that the court erred in the answer to the defendants' fifteenth point, which point and answer were as follows:

POINT.—That if the jury believe from the evidence that Miller & Bro. became bona fide purchasers for value of the bill of lading, and that the original and same bill of lading had been sent by the Merchants' National Bank to the Bank of North America, then the onus of proof is on the Bank of North America to show how they lost possession of said bill of lading, and having failed to show that, the verdict should be for the defendants.

Answer. So absolute an instruction as matter of law cannot be
29 given. But it appears to the court a reasonable suggestion that the plaintiffs should have given evidence under this head, and their ommission to do so is a proper subject for the consideration of the jury.

And afterwards, to wit, on the thirtieth day of October, in the year last aforesaid, before our said judges come the parties aforesaid, by their attorneys aforesaid, upon which the record and matters aforesaid having been seen and by the court fully understood, and all and singular the premises having been examined, and mature deliberation being had thereon, and for it seems to the court now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be granted quashed and that no new trial ought to be had of the issues aforesaid.

30 And afterwards, to wit, on the seventh day of December, in the year last aforesaid, the court, on reconsideration, vacate the order of October the thirtieth, A. D. 1875, refusing a new trial and entering judgment upon the verdict, and grant a new trial.

Whereupon, afterwards, to wit, on the sixth day of April, in the year of our Lord one thousand eight hundred and seventy-six, another jury being called, come, to wit:

1. George W. Saylor.
2. Jeremiah Mohler.
3. Davis B. Richards.
4. Henry B. Talley.
5. John A. Fulton.
6. Christian Smith.
7. Abraham Britton.
8. James A. Hayes.
9. William J. Burkhart.
10. Henry Myers.
11. Frederick Fox.
12. Jediah Murphy.

who, being duly empanelled, are respectively sworn or affirmed to
31 try the issues joined, &c., &c.

And afterwards, to wit, on the twelfth day of April, in the year last aforesaid, the jurors aforesaid on their oaths and affirmations aforesaid respectively do say that they find for the plaintiff, and being asked before the verdict is recorded—

1st. Whether there was any negligence of the plaintiffs or their agents in parting with possession of the bill of lading;

2d. Whether Miller & Co. knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft;

Say that on the first question they find in the negative.

And on the second question they find in the affirmative.

32 And they find the value of the goods eloigned is seven thousand and fifteen $\frac{97}{100}$ dollars, and assess the damages at that amount, with costs.

And afterwards, to wit, on the twenty-second day of April, in the year last aforesaid, before our said judges come the parties aforesaid, by their attorneys aforesaid, upon which the record and matters aforesaid having been seen and by the court fully understood, and all and singular the premises having been examined and mature deliberation being had thereon, and for that it seems to the court now here that the verdict aforesaid is in no wise insufficient or erroneous and that the same ought not to be quashed, and that no new trial ought to be had of the issues aforesaid:

Therefore it is considered that the said Merchants' National Bank of St. Louis do recover against the said Hugh Shaw and David Reese Esrey, copartners trading as Shaw and Esrey, as well the said
33 sum of seven thousand and fifteen $\frac{97}{100}$ dollars, the amount of the verdict aforesaid, as also the sum of for their costs and charges about their suit in that behalf expended to the said plaintiffs by the court here adjudged to the said plaintiffs with their assent by way of increase, which said damages in the whole amount to .

And the defendants, in mercy, &c.

34 And afterwards, to wit, on the twentieth day of June, in the year last aforesaid, the said defendants come and file their bond on their writ of error to the Supreme Court of the United States, which said bond is as follows, to wit:

In the circuit court of the United States for the eastern district of Pennsylvania, of October sessions, 1874.

THE MERCHANTS' NATIONAL BANK OF ST. Louis, a citizen of the State of Missouri,
vs.
HUGH SHAW AND DAVID REESE ESREY, copartners trading as Shaw and Esrey, citizens of the State of Pennsylvania. } No. 79.

Know all men by these presents that we, Andrew H. Miller and Joseph W. Miller, are held and firmly bound unto The Merchants'
35 National Bank of St. Louis in the sum of ten thousand dollars ($10,000), lawful money of the United States of America, to which payment, well and truly to be made, we do bind and oblige ourselves, our heirs, executors, and administrators, and every of them, jointly and sev-

erally, firmly by these presents. Sealed with our seals, dated this sixteenth day of June, anno Domini eighteen hundred and seventy-six (1876).

Whereas in the above-entitled suit adjudgment was rendered against the above-named defendants therein, to which judgment a writ of error from the Supreme Court of the United States has been obtained by the said Hugh Shaw and David Reese Esrey, the same being returnable to the second Monday of October, A. D. 1876:

Now, the condition of the above obligation is such that if the said Hugh Shaw and David Reese Esrey shall prosecute the said writ of error to effect and answer all damages and costs if they fail to
36 make their plea good, then the above obligation to be void; else to remain in full force and virtue.

AND. H. MILLER. [SEAL.]
JOS. WM. MILLER. [SEAL.]

Sealed and delivered in the presence of us—
JOHN M. RIDINGS.
SAMUEL BELL.

Which said bond is endorsed as follows: 79. October sessions, 1874. C. C. of U. S., E. dist. of Pa. The Merchants' National Bank of St. Louis vs. Shaw and Esrey. Bond on bail in error.

JUNE 19, 1876.

The within bond and the sureties therein approved.
W. McKENNAN
Cir. Judge.

Filed June 20, 1876.

And afterwards, to wit, on the day of , A. D. 187 , the defendants by their attorneys file the following bill of exceptions, which being read, is as follows, to wit:

37 Be it remembered that in the sessions of October, A. D. 1874, came The Merchants' National Bank of St. Louis, a citizen of the State of Missouri, into the circuit court of the United States in and for the eastern district of Pennsylvania, and impleaded Hugh Shaw and David Reese Esrey, copartners trading as Shaw & Esrey, of the State of Pennsylvania, in a certain plea of replevin, &c., in which the said The Merchants' National Bank declared (prout narr.) and the said Shaw and Esrey pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city of Philadelphia, before the honorable William McKennan and John Cadwalader, judges of the said court, on Thursday, the sixth day of April, A. D. 1876, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiffs first offered in evidence the testimony of Richard Eagle and Louis C. Norvell, witnesse' examined under a commission issued out of this court to St. Louis, Missouri, which testimony was duly taken before William A. Garesche, esq., in the city of St. Louis, Missouri, on the 31st day of

March, A. D. 1876, and duly returned and filed in this court on the sixth day of April, A. D. 1876 (prout same). The testimony under said commission and the exhibits produced thereat being as follows, to wit:

38 In the circuit court of the United States for the eastern district of Pennsylvania. October sessions, 1874.

THE MERCHANTS' NATIONAL BANK OF ST. Louis, a citizen of the State of Missouri,
vs.
HUGH SHAW AND DAVID REESE ESREY, TRADing as Shaw & Esrey, citizens of the State of Pennsylvania. } No. 79.

Interrogatories to be propounded to witnesses to be sworn or affirmed, and examined on the part and behalf of the plaintiff, in the above action now pending in the circuit court of the United States for the eastern district of Pennsylvania, wherein The Merchants' National Bank of St. Louis, a citizen of the State of Missouri, is plaintiff, and Hugh Shaw and David Reese Esrey, trading as Shaw & Esrey, citizens of the State of Pennsylvania, are defendants.

First interrogatory. What is your name, age, residence and occupation?

Second interrogatory. Do you know or have you had any business dealings with the parties to this action, and for how long?

Third interrogatory. Did you know or have business dealings
39 with the firm of M. Kuhn & Bro., lately doing business in the city of Philadelphia, and for how long a time?

Fourth interrogatory. What, if any sort, of business or business transactions did the said firm of M. Kuhn & Bro. engage in in the city of St. Louis during the year 1874; state what, if any, was the nature of your connection with such business or transactions?

Fifth interrogatory. Have you any knowledge of the shipment from St. Louis to Philadelphia, on or about the 11th day of November, 1874, of 144 bales of cotton marked "W. D. I."? If you have such knowledge, state how it was derived, and also fully and in detail, what if any interest the plaintiff had in such cotton, and how such interest was acquired. In the same connection mention if you know for whom, or on whose account the said cotton was shipped, and what, if anything, was agreed upon between the plaintiff and the owner or owners of such cotton, as to the interest which the plaintiff should acquire therein, and the length of time which such interest should be held by the plaintiff; state such agreement fully and in detail; state also by what line or transportation company the said cotton was shipped to Philadelphia.

Sixth interrogatory. If you have stated that the plaintiff be-
40 came interested in the said cotton as collateral for the payment of a bill or bills of exchange, state the particulars of such bill or bills of exchange, such as date, amount, &c., and whether or not the same has or have been paid. If you have the said bill or bills in your possession, please furnish them to the commissioner to be identified and marked, and copies thereof to be attached to your deposition.

Seventh interrogatory. If you have any bill or bills of lading for the said cotton, please furnish them to the commissioner to be identified and marked, and copies thereof to be attached to your deposition. In the same connection, state what disposition if any was made by you of

the said bill or bills of lading; state fully what was done with both the original and duplicate bills of lading, when the said cotton was shipped.

Eighth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

41 U. S. C. C. Oct. sess., 1874.

THE MERCHANTS' NATIONAL BANK OF ST. LOUIS, a citizen of the State of Missouri,
vs.
HUGH SHAW AND DAVID REESE ESREY, TRADING as Shaw and Esrey, of the State of Pennsylvania. } No. 79.

SAME
vs.
MILLER & BRO. } C. C. P. No. 1. D. 74. 1264.

The said defendants by their attorneys, reserving all legal exceptions to the interrogatories in chief, file the following cross-interrogatories to be propounded to witnesses sworn or affirmed, and examined under the commission to be issued in the above case:

1st cross-interrogatory. State how long you have been engaged in your present occupation. What was you' occupation in November, 1874, and how long you were engaged in that occupation; with what other persons were you engaged; under what name was the business conducted, and what was the nature and character of that occupation?

42 Second cross-interrogatory. Have you had anything to do with consignments of cotton or other merchandise from St. Louis to M. Kuhn & Brother, of Philadelphia? If aye, state what the consignments were; by what transportation lines they were forwarded; what, if any, bill of lading or transportation receipts were given for the same; whether these bills of lading were issued in sets or otherwise; and, if in sets, how many constituted a set; and what disposition was made of each bill. Were any of these bills of lading transferred to the plaintiff? and, if so, state which bills were so transferred, giving in each instance the date of the bill and the goods to which it referred, and annexing to your deposition a copy of the form in which the bill was drawn, and what marks or memoranda were upon it. What was the occasion of the transfer of each bill thus transferred? If you shall answer that the bills were annexed or attached to drafts drawn upon M. Kuhn & Bro., state whether the said drafts were discounted or purchased by the plaintiff or received by them for collection only, and in each instance give the dates and amounts of the bills, and the times which they had respectively to run; and whether from sight or from date; by whom and on whom they were drawn; and whether they were paid or not; when each transaction took place, and between what persons it

43 was arranged or effected. If you have not already given the information, please s ate what was done with the other bills of lading of the set of which one was thus transferred or pledged.

Third cross-interrogatory. Through what agency were the drafts thus transferred to the plaintiff collected or presented for collection? What

instructions or directions were given as to that presentation or collection, and as to the disposition of the bills of lading forwarded in the drafts? In what manner were such instructions given? Annex to your deposition copies of all written instructions or correspondence on the subject, and state what verbal instructions, if any, were given, and when, where, and by whom they were given; what arrangements were made as to the receipt and storage of the goods on their arrival; what provision was made for storage and insurance; were any expenses on these accounts paid or incurred by the plaintiffs; and, if so, when and to what extent?

Fourth cross-interrogatory. State whether M. Kuhn & Bro. are now in business; if so, where; also, state the date of last transaction you had with M. Kuhn & Bro.

44 Fifth cross-interrogatory. What other business transactions did you have with the firm of M. Kuhn & Bro. other than those during the year 1874? State fully the nature and character of those transactions.

Sixth cross-interrogatory. Has any, and what, arrangement, promise, or agreement been made by any one with you, or, so far as your knowledge extends, with any other witness in the cause, in regard to his or your compensation as a witness, or for any services rendered or to be rendered in the cause by you or by such other witness? Have you contributed anything towards the expenses of carrying on the suit, and are you to receive any remuneration or return in case of success? State fully and minutely all your knowledge and information in relation thereto.

Seventh cross-interrogatory. If in your answer to any of the interrogatories you annex or refer to any paper, letter, or document, state particularly from whom, when, where, and by what authority you became possessed of the same.

Eight' cross-interrogatory. If, after reading or hearing read *to* the cross-interrogatories which precede the present cross-interroga-
45 tory, you know or can recollect any other matter or thing which is or may be material or of advantage to the party filing the cross-interrogatories which is not responsive to the preceding cross-interrogatories, please to state the said matter or thing as fully and minutely as if specially interrogated thereto.

The defendants name for their commissioner D. W. Paul, esq., n. w. cor. of 3rd & Pine sts., St. Louis, Mo.

46 Depositions of witnesses produced, sworn and examined on the 31st day of March, A. D. 1876, at the office of the Merchants' National Bank, northwest corner of Locust and Main streets in the city and county of St. Louis, in the State of Missouri, by virtue of a commission issuing from the circuit court of the United States in and for the eastern district of Pennsylvania, in the 3rd circuit, by virtue of the commission and interrogatories hereto attached to Wm. A. Garesché and D. W. Paul, directed for the examination of witnesses in a certain cause depending in said court wherein the Merchants' National Bank of St. Louis is plaintiff and Hugh Shaw and David Reese Esrey, trading as Shaw & Esrey, are defendants.

LEWIS C. NORVELL, of the city and county of St. Louis, being produced, sworn and examined, on the part of plaintiff, deposes and says:

My name is Lewis C. Norvell. I am 44 years old; I reside in the city of St. Louis; I am by occupation a cotton broker.

To the 1st interrogatory on the part of the plaintiff, answers as above.

the said bill or bills of lading; state fully what was done with both the original and duplicate bills of lading, when the said cotton was shipped.

Eighth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

41 U. S. C. C. Oct. sess., 1874.

THE MERCHANTS' NATIONAL BANK OF ST. Louis, a citizen of the State of Missouri,
vs.
HUGH SHAW AND DAVID REESE ESREY, TRADING as Shaw and Esrey, of the State of Pennsylvania. } No. 79.

SAME
vs.
MILLER & BRO. } C. C. P. No. 1. D. 74. 1264.

The said defendants by their attorneys, reserving all legal exceptions to the interrogatories in chief, file the following cross-interrogatories to be propounded to witnesses sworn or affirmed, and examined under the commission to be issued in the above case:

1st cross-interrogatory. State how long you have been engaged in your present occupation. What was you' occupation in November, 1874, and how long you were engaged in that occupation; with what other persons were you engaged; under what name was the business conducted, and what was the nature and character of that occupation?

42 Second cross-interrogatory. Have you had anything to do with consignments of cotton or other merchandise from St. Louis to M. Kuhn & Brother, of Philadelphia? If aye, state what the consignments were; by what transportation lines they were forwarded; what, if any, bill of lading or transportation receipts were given for the same; whether these bills of lading were issued in sets or otherwise; and, if in sets, how many constituted a set; and what disposition was made of each bill. Were any of these bills of lading transferred to the plaintiff? and, if so, state which bills were so transferred, giving in each instance the date of the bill and the goods to which it referred, and annexing to your deposition a copy of the form in which the bill was drawn, and what marks or memoranda were upon it. What was the occasion of the transfer of each bill thus transferred? If you shall answer that the bills were annexed or attached to drafts drawn upon M. Kuhn & Bro., state whether the said drafts were discounted or purchased by the plaintiff or received by them for collection only, and in each instance give the dates and amounts of the bills, and the times which they had respectively to run; and whether from sight or from date; by whom and on whom they were drawn; and whether they were paid or not; when each transaction took place, and between what persons it

43 was arranged or effected. If you have not already given the information, please s ate what was done with the other bills of lading of the set of which one was thus transferred or pledged.

Third cross-interrogatory. Through what agency were the drafts thus transferred to the plaintiff collected or presented for collection? What

instructions or directions were given as to that presentation or collection, and as to the disposition of the bills of lading forwarded in the drafts? In what manner were such instructions given? Annex to your deposition copies of all written instructions or correspondence on the subject, and state what verbal instructions, if any, were given, and when, where, and by whom they were given; what arrangements were made as to the receipt and storage of the goods on their arrival; what provision was made for storage and insurance; were any expenses on these accounts paid or incurred by the plaintiffs; and, if so, when and to what extent?

Fourth cross-interrogatory. State whether M. Kuhn & Bro. are now in business; if so, where; also, state the date of last transaction you had with M. Kuhn & Bro.

44 Fifth cross-interrogatory. What other business transactions did you have with the firm of M. Kuhn & Bro. other than those during the year 1874? State fully the nature and character of those transactions.

Sixth cross-interrogatory. Has any, and what, arrangement, promise, or agreement been made by any one with you, or, so far as your knowledge extends, with any other witness in the cause, in regard to his or your compensation as a witness, or for any services rendered or to be rendered in the cause by you or by such other witness? Have you contributed anything towards the expenses of carrying on the suit, and are you to receive any remuneration or return in case of success? State fully and minutely all your knowledge and information in relation thereto.

Seventh cross-interrogatory. If in your answer to any of the interrogatories you annex or refer to any paper, letter, or document, state particularly from whom, when, where, and by what authority you became possessed of the same.

Eight' cross-interrogatory. If, after reading or hearing read *to* the cross-interrogatories which precede the present cross-interroga-

45 tory, you know or can recollect any other matter or thing which is or may be material or of advantage to the party filing the cross-interrogatories which is not responsive to the preceding cross-interrogatories, please to state the said matter or thing as fully and minutely as if specially interrogated thereto.

The defendants name for their commissioner D. W. Paul, esq., n. w. cor. of 3rd & Pine sts., St. Louis, Mo.

46 Depositions of witnesses produced, sworn and examined on the 31st day of March, A. D. 1876, at the office of the Merchants' National Bank, northwest corner of Locust and Main streets in the city and county of St. Louis, in the State of Missouri, by virtue of a commission issuing from the circuit court of the United States in and for the eastern district of Pennsylvania, in the 3rd circuit, by virtue of the commission and interrogatories hereto attached to Wm. A. Garesché and D. W. Paul, directed for the examination of witnesses in a certain cause depending in said court wherein the Merchants' National Bank of St. Louis is plaintiff and Hugh Shaw and David Reese Esrey, trading as Shaw & Esrey, are defendants.

LEWIS C. NORVELL, of the city and county of St. Louis, being produced, sworn and examined, on the part of plaintiff, deposes and says:

My name is Lewis C. Norvell. I am 44 years old; I reside in the city of St. Louis; I am by occupation a cotton broker.

To the 1st interrogatory on the part of the plaintiff, answers as above.

the said bill or bills of lading; state fully what was done with both the original and duplicate bills of lading, when the said cotton was shipped.

Eighth interrogatory. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

41 U. S. C. C. Oct. sess., 1874.

THE MERCHANTS' NATIONAL BANK OF ST. Louis, a citizen of the State of Missouri,
vs.
HUGH SHAW AND DAVID REESE ESREY, TRADing as Shaw and Esrey, of the State of Pennsylvania. } No. 79.

SAME
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The said defendants by their attorneys, reserving all legal exceptions to the interrogatories in chief, file the following cross-interrogatories to be propounded to witnesses sworn or affirmed, and examined under the commission to be issued in the above case:

1st cross-interrogatory. State how long you have been engaged in your present occupation. What was you' occupation in November, 1874, and how long you were engaged in that occupation; with what other persons were you engaged; under what name was the business conducted, and what was the nature and character of that occupation?

42 Second cross-interrogatory. Have you had anything to do with consignments of cotton or other merchandise from St. Louis to M. Kuhn & Brother, of Philadelphia? If aye, state what the consignments were; by what transportation lines they were forwarded; what, if any, bill of lading or transportation receipts were given for the same; whether these bills of lading were issued in sets or otherwise; and, if in sets, how many constituted a set; and what disposition was made of each bill. Were any of these bills of lading transferred to the plaintiff? and, if so, state which bills were so transferred, giving in each instance the date of the bill and the goods to which it referred, and annexing to your deposition a copy of the form in which the bill was drawn, and what marks or memoranda were upon it. What was the occasion of the transfer of each bill thus transferred? If you shall answer that the bills were annexed or attached to drafts drawn upon M. Kuhn & Bro., state whether the said drafts were discounted or purchased by the plaintiff or received by them for collection only, and in each instance give the dates and amounts of the bills, and the times which they had respectively to run; and whether from sight or from date; by whom and on whom they were drawn; and whether they were paid or not;

43 when each transaction took place, and between what persons it was arranged or effected. If you have not already given the information, please s ate what was done with the other bills of lading of the set of which one was thus transferred or pledged.

Third cross-interrogatory. Through what agency were the drafts thus transferred to the plaintiff collected or presented for collection? What

instructions or directions were given as to that presentation or collection, and as to the disposition of the bills of lading forwarded in the drafts? In what manner were such instructions given? Annex to your deposition copies of all written instructions or correspondence on the subject, and state what verbal instructions, if any, were given, and when, where, and by whom they were given; what arrangements were made as to the receipt and storage of the goods on their arrival; what provision was made for storage and insurance; were any expenses on these accounts paid or incurred by the plaintiffs; and, if so, when and to what extent?

Fourth cross-interrogatory. State whether M. Kuhn & Bro. are now in business; if so, where; also, state the date of last transaction you had with M. Kuhn & Bro.

44 Fifth cross-interrogatory. What other business transactions did you have with the firm of M. Kuhn & Bro. other than those during the year 1874? State fully the nature and character of those transactions.

Sixth cross-interrogatory. Has any, and what, arrangement, promise, or agreement been made by any one with you, or, so far as your knowledge extends, with any other witness in the cause, in regard to his or your compensation as a witness, or for any services rendered or to be rendered in the cause by you or by such other witness? Have you contributed anything towards the expenses of carrying on the suit, and are you to receive any remuneration or return in case of success? State fully and minutely all your knowledge and information in relation thereto.

Seventh cross-interrogatory. If in your answer to any of the interrogatories you annex or refer to any paper, letter, or document, state particularly from whom, when, where, and by what authority you became possessed of the same.

Eight' cross-interrogatory. If, after reading or hearing read *to* the cross-interrogatories which precede the present cross-interroga-
45 tory, you know or can recollect any other matter or thing which is or may be material or of advantage to the party filing the cross-interrogatories which is not responsive to the preceding cross-interrogatories, please to state the said matter or thing as fully and minutely as if specially interrogated thereto.

The defendants name for their commissioner D. W. Paul, esq., n. w. cor. of 3rd & Pine sts., St. Louis, Mo.

46 Depositions of witnesses produced, sworn and examined on the 31st day of March, A. D. 1876, at the office of the Merchants' National Bank, northwest corner of Locust and Main streets in the city and county of St. Louis, in the State of Missouri, by virtue of a commission issuing from the circuit court of the United States in and for the eastern district of Pennsylvania, in the 3rd circuit, by virtue of the commission and interrogatories hereto attached to Wm. A. Garesché and D. W. Paul, directed for the examination of witnesses in a certain cause depending in said court wherein the Merchants' National Bank of St. Louis is plaintiff and Hugh Shaw and David Reese Esrey, trading as Shaw & Esrey, are defendants.

LEWIS C. NORVELL, of the city and county of St. Louis, being produced, sworn and examined, on the part of plaintiff, deposes and says:

My name is Lewis C. Norvell. I am 44 years old; I reside in the city of St. Louis; I am by occupation a cotton broker.

To the 1st interrogatory on the part of the plaintiff, answers as above.

To the second interrogatory on the part of the plaintiff answers
47 as follows: I know the parties, and have had business dealings with the Merchants' National Bank for over two years, but have had no business transactions with defandants.

To the 3rd interrogatory on the part of plaintiff answers as follows: I did know and have business dealings with the firm of M. Kuhn & Bro. from March to December, 1874.

To the 4th interrogatoty on the part of the plaintiff answer as follows: During 1874 M. Kuhn & Bro. were buying, in this city, cotton, flour, & tobacco & corn. I purchased for them cotton & flour.

To the 5th interrogatory on the part of the plaintiff, answers as follows: I have knowledge of the shipment from St. Louis to Philadelphia, on or about the 11th of November, 1874, of 144 bales of cotton marked "W. D. L," having made the shipment myself. I purchased this cotton upon an order from M. Kuhn & Bro., Philadelphia, and sold my draft on them at twenty days' sight to the plaintiff. The draft was for the money to pay for this cotton. I gave plaintiff the original bill of lading for 170 bales of cotton—I should have said above that
48 the 144 bales spoken of were a part of 170 bales of cotton—with the understanding that plaintiff was to hold the bill of lading until the draft was paid. The cotton was shipped on the account of M. Kuhn & Bro., was paid for as described above by plaintiff and belonged to plaintiff until the draft was paid.

The plaintiff's interest in the cotton continued until the draft was paid. The agreement was made between James E. Yeatman, president of the Merchants' National Bank, and myself, as drawer of the draft, and Marx Kuhn, of the firm of M. Kuhn & Bro., as acceptors.

The agreement was as follows: Mr. Yeatman was to take my drafts on M. Kuhn & Bro. to the extent of a line of fifty thousand dollars, holding the cotton as collateral for the security of payment of said drafts and a collateral of three thousand dollars that I individually placed with the bank to indemnify them against loss on the account.

That was the substance of the agreement. The cotton was shipped by the Erie and Pacific Dispatch Transportation Line on the 11th of November, 1874.

To the 6th interrogatory on the part of the plaintiff, answers as
49 follows: A general description of the draft is as follows:

A draft drawn on the 11th of November, 1874, for $11,947$\frac{43}{100}$ against 170 bales of cotton with the original bill of lading attached, drawn by Norvell & Co. on M. Kuhn & Bro., which was discounted on that day by the plaintiff, the proceeds of which paid for the 170 bales of cotton invoiced. Said draft has not been paid in whole or in any part thereof. The bill is not in my possession, but is held and owned by the plaintiff.

To the 7th interrogatory on the part of the plaintiff, answers as follows: I have not the bills of lading, they being held by the plaintiff. On the 11th of November I handed the plaintiff the original bill of lading for 170 bales of cotton. I sent the duplicate to M. Kuhn & Bro. at Philadelphia.

To the 8th interrogatory on the part of the plaintiff, answers as follows: I know nothing further in regard to this matter that would be advantageous to the parties in this cause or that is material to the subject of my examination or the matters in question in this cause.

50 Upon cross-examination:

To the 1st cross-interrogatory of defendants answers as follows: I have been engaged in my present occupation as cotton broker in St. Louis since September, 1873, but have been engaged in the cotton trade for 20 years. I was a cotton broker in 1874. I was engaged in that occupation with no one since Sept., 1873. My business is conducted in the name of Norvell & Co. The nature of business was that of cotton broker, to a large extent buying on orders and shipping to various persons in all the principal markets of the country. The amount of my shipments amounted to about $1,000,000.00 annually.

To the 2nd cross-interrogatory on the part of defendant answers as follows: I have had from March to December 3rd, 1874, large transactions with M. Kuhn & Bro., but never made any consignments, always actual purchases on their order, for which I charged them a commission. I purchased for them cotton & flour during that period, and shipped over the lines of the Great Western Dispatch, Erie, and Pacific, Continental, Star, Union, and Red lines.

I never made a shipment without receiving a bill of lading
51 from the line by which it was shipped. Said bills of lading were always issued in originals and duplicates, which constituted a set of bills of lading. Two constituted a set, which were always given us, keeping a third themselves. I invariably handed the original bill of lading with my draft for the amount of the shipment to the banks purchasing same, and remitted the duplicates by mail to M. Kuhn & Bro. Many of these bills were transferred to the plaintiff.

I here give paper marked Exhibit A as being a correct statement of all my cotton transactions with Messrs. M. Kuhn & Bro., being a transcript from my books, and embodying the dates of said transactions, the amount of each shipment, the name of the party with whom the bills of lading were hypothecated, the amount for which said bills were hypothecated, the various lines of transportation with which the various shipments were made, and the marks on the various bills of cotton.

All these various drafts were paid at maturity except draft dated Nov. 11th, 1874, against 170 bales of cotton shipped by Erie & Pacific Despatch, 20 days' sight, $11,947.43, on M. Kuhn & Bro., Philadelphia, drawn by Norvell & Co., 17th November, 1874; 155 bales of cotton,
$11,389.06, twenty days' sight, E. & P. Despatch, drawn in same
52 manner on same person, by Norvell & Co.; 83 bales of cotton on 18th of November, $5,587.14, twenty days, shipped by Erie & Pacific Despatch, drawn same as the above; 24th November, $8,913.92, 20 days' sight, 131 bales shipped by Continental Line, drawn same as above.

The busine-s transaction took place on the day the drafts were drawn through the plaintiff. The original bills of lading in each case were given to the plaintiff at the time the drafts were discounted, and the duplicates were sent to M. Kuhn & Bro. by Norvell and Co.

To the 3rd cross-interrogatory of defendant answers as follows: I don't know through whose agency the drafts so transferred to the plaintiff were presented for collection. I don't know what instructions were given as to the presentation or collection of the draft, or what disposition was made of the bills of lading forwarded in the drafts, nor do I know the manner in which any instructions were given or when or where any were given or by whom given. I don't know what arrangements were made as to the receipt or storage of the goods on their arrival. I don't know what provision was made for storage or in-

53 surance. I don't know whether any expenses on these accounts were paid or incurred by the plaintiff, or where or to what extent.

To the 4th cross-interrogatory of defendants answers as follows: I don't know whether M. Kuhn & Bro. are in business now, nor do I know where they are. The date of last transaction with Kuhn & Bro. was on the 3rd of December, 1874. It was a shipment of cotton.

To the 5th cross-interrogatory of defendants answers as follows: I never had any other business transactions with M. Kuhn & Bro. other than those of 1874.

To the 6th cross-interrogatory on the part of defendant answers as follows: No arrangement, promise, or agreement has been made by any one with me whatever, or, so far as my knowledge extends, with any other witness in the cause, in regard to his or my compensation as a witness, or for any services rendered or to be rendered in the cause by me or by any other witness. I have not contributed anything to-
54 wards the expenses of carrying on the suit, and I am not to receive any remuneration or return in the case of success. I don't know of any arrangement with any one for that purpose.

To the 7th cross-interrogatory of defendants, answers as follows: I have referred only to Exhibit A, which has been prepared by me as a transcript from my books.

To the eighth cross-interrogatory of defendant, answers as follows: I know of nothing material to the cause or beneficial to the defendants other than I have stated.

L. C. NORVELL.

55 ROBERT EAGLE, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

To the 1st interrogatory of plaintiff, answers as follows: My name is Robert Eagle; my age is 49 years; my residence, St. Louis; my occupation, cashier of the Merchants' National Bank of St. Louis.

To the 2nd interrogatory of plaintiff, answers as follows: I know the plaintiff; not the defendants. I have been connected with the Merchants' National Bank since 1865.

To the 3rd interrogatory of plaintiff, answers as follows: As cashier of the Merchants' National Bank, I had business dealings with M. Kuhn & Bro. through Norvell & Co., from March, 1874, to December, 1874.

To the 4th interrogatory of plaintiff, answers as follows: I do not know what transactions or business M. Kuhn & Bro. engaged in
56 in the city of St. Louis during 1874. I had no connection with such business or transaction. My transactions were only with Norvell & Co., purchasing drafts as cashier.

To the 5th interrogatory of plaintiff, answers as follows: I had knowledge of the shipment from St. Louis to Philadelphia, on or about the 11th of November, 1874, of 144 bales of cotton marked W. D. I. I obtained such knowledge by purchase of the draft, to secure payment of which, a bill of lading of that date given for 170 bales of cotton of the Erie Pacific Despatch Co. was given as collateral security. It was shipped for the account of M. Kuhn & Bro. We purchased the draft with the original bill of lading attached, the bill of lading to be held until the draft was paid. That was all the agreement with me. The said cotton was shipped to Philadelphia over the Erie and Pacific Despatch Transportation Company.

To the 6th interrogatory of plaintiff, answers as follows: The bill is drawn by Norvell and Co., dated St. Louis, 11th November,
57 1874, payable twenty days after sight to the order of Norvell &

Co., for $11,947.43, on 170 bales of cotton, drawn on M. Kuhn & Bro., Philadelphia, endorsed Norvell & Co.; also endorsed, pay J. H. Watt, esq., cashier, or order. Robert Eagle, cashier. (Original of draft here produced by witness March 31st, 1876, and copy attached marked Exhibit A.) The same still remains wholly unpaid.

To the 7th interrogatory of plaintiff, answers as follows: I have not the original bill of lading which was attached to the draft sent on for collection. I have a duplicate bill of lading which was returned to me with said draft protested, which was not the bill of lading attached and sent by me when the draft was sent for collection.

(Duplicate produced and identified by witness and marked by commissioner, a copy whereof being hereto attached and marked Exhibit C.)

I sent the original bill of lading with draft attached to J. H. Watt, cashier of the Bank of North America, in Philadelphia, with instructions to retain the bill of lading until the draft was paid. The original bill of lading was attached to the draft and transmitted as above stated
58 by me. Of the duplicate I have no knowledge, except that it was returned to me with the protested draft.

To the 8th interrogatory of plaintiff, answers as follows: I know nothing further of benefit or advantage to the parties in this cause or material to the subject of this my examination on the matters in question.

On cross-examination:

To the 1st cross-interrogatory of defendants answers as follows: I have been engaged in my present occupation since May, 1874. In November, 1874, I was cashier of the Merchants' National Bank. I have engaged in my present occupation in conjunction with the other officers of the bank. The business was conducted under the name of the Merchants' National Bank. I transacted the general duties of the cashier of the bank.

To the 2sd cross-interrogatory of defendants answers as follows: I have purchased drafts drawn by Norvell & Co. on M. Kahn & Bro.,
59 of Philadelphia, for which bills of lading were given as collateral security. The consignments were of cotton by the Erie & Pacific Dispatch Company, The Continental, The Great Western, The Red Line, and The Star Union Line. Original bills of lading were given for the same to me by Mr. Norvell when he negotiated the drafts. I don't know whether they were issued in sets or not. I don't know how many constituted a set. The original bill of lading was each time attached to the draft, and sent to our correspondent in Philadelphia. I don't know what was done with any others.

Each original bill of lading was delivered to the plaintiff. The original bills of lading delivered to me by Norvell were sent as I have already stated to our correspondent in Philadelphia, and as I am informed on payment of the drafts to which they were attached were delivered to Kuhn & Bro., and I have no record of these bills of lading or recollection sufficiently positive to state as to their dates of the bills, or what marks or memoranda were upon them. I recollect, however, that they were all for cotton. I don't remember what the forms of the bills were.

60 The plaintiff purchased the drafts from Norvell and Co. The statement hereto annexed and marked Exhibit D is a correct transcript from our books of the dates of the drafts, and the amounts, and the times they had respectively to run, and by whom and on whom they were drawn, and also those that were paid, and those remaining unpaid. The

transactions severally took place at the dates respectively of the drafts, and were all arranged between plaintiff and Norvell & Co.

To the 3rd cross-interrogatory of defendants answers as follows: The drafts were each time sent to the Bank of North America in Philadelphia for collection. My instructions to the Bank of North America were in each case to retain the bills of lading until the draft was paid. My instructions were given by letter. No verbal instructions were given to Bank of North America.

(Copies of instructions here produced identified by witness, and marked Exhibit E.)

The exhibit just identified are copies of my instructions.

61 I don't know what arrangements were made for the receipt and storage of the goods on their arrival. I do not know what provisions were made for their storage and insurance. No arrangements were made on these accounts, nor was anything in the way of expense paid or incurred by plaintiff on these accounts to my knowledge.

To the 4th cross-interrogatory of defendant answers as follows: I don't know whether M. Kuhn & Bro. are now in business nor where they are. My last transaction in their regard was on December 3rd, 1874.

To the 5th cross-interrogatory of defendants answers as follows: I had no other transactions with M. Kuhn & Bro. other than those of 1874.

To the 6th cross-interrogatory of defendants answers as follows: No arrangement has been made with me nor with any other witness to my knowledge in regard to his or my compensation as a witness or for any services rendered or to be rendered by me or any other witness.

62 I have contributed nothing in my individual capacity toward the expenses of the suit. As cashier of the Merchants' National Bank it has become my duty to pay certain attorney fees in this cause. Personally I am not to be remunerated or to receive any return in case of plaintiff's success.

To the 7th cross-interrogatory of defendants, answers as follows: In relation to the drafts spoken of and the bill of lading also, I obtained both of these, in my capacity as cashier, from Norvell & Co. The duplicate bill of lading referred to was sent me, in my capacity of cashier, by the Bank of North America. The instructions given by us to that bank were instructions sent by me, as cashier, and copied prior to their sending into my letter-book.

To the 8th cross-interrogatory of defendants, answers as follows: After hearing read the previous cross-interrogatories, I do not know and cannot recollect any other matter or thing which is or may be material or of advantage to the party filing the cross-interrogatories, and

63 which is not responsive to the foregoing cross-interrogatories.

As an explanation of witness' answer to the third cross-interrogatory, witness now explains that prior to June, 1874, plaintiff, through me, instructed plaintiff's correspondent to deliver up bills of lading on acceptance.

ROBERT EAGLE.

64 *Statement referred to as Exhibit A in the foregoing depositions.*

Date.	Bales cotton, etc.	Line shipped by.	Drafts & time.	Bank sold to.
1874.				
Ap'l 16.	23 B. C.....	G. W. D....	$1,336 37, 10 d. s..	Merch't Nat. B'k.
" 22.	39 "	"	2,245 48, " ..	" "
" 28.	50 "	"	3,297 00, 30 d. s..	" "
" 30.	49 "	"	3,796 59, " ..	" "
May 8.	53 "	"	4,205 16, " ..	" "
" 14.	115 "	"	7,910 62, " ..	" "
" 19.	74 "	"	5,588 69, 10 d. s..	A., C. & N., Allen, Copp & Nesbit.
" 28.	71 "	"	5,356 90, 30 d. s..	" "
June 3.	44 "	"	2,965 75, 10 d. s..	3rd Nat. B'k, 3rd Nat.
" 4.	20 "	"	1,503 45, 15 d. s..	State B'k.
" 8.	34 "	"	2,426 54, 10 " ..	Merch'ts' Nat. B'k.
" 13.	54 "	"	3,815 80, " ..	Exchange Bank.
" 15.	106 "	"	6,614 80, " ..	Merch'ts' Nat. B'k.
" 20.	21 "	"	1,315 30, " ..	Exchange Bank.
" 22.	44 "	"	3,030 47, " ..	" "
" 23.	50 "	"	3,593 61, " ..	Merch't Nat. B'k.
" 26.	43 "	"	2,970 71, " ..	State Bank.
" "	34 "	"	2,426 99, " ..	A., C. & N., Allen, Copp & Nesbit.
" 30.	112 "	"	8,071 63, 15	Merch'ts' Nat. B'k.
July 3.	37 "	"	2,516 13, 10	State Bank.
" 7.	59 "	"	4,222 90, 20	Merch'ts' Nat. B'k.
" 10.	34 "	"	2,265 57, 10 d. s..	State Bank.
" 15.	48 "	"	3,497 77, 20 " ..	Merch'ts' Nat. B'k.
" 16.	52 "	"	3,363 19, " d. d..	A., C. & N., Allen, Copp & Nesbit.
65				
July 24.	50 B. C.....	G. W. D....	3,397 28, 15 d. s..	Merch'ts' Nat. B'k.
" "	200 bbls. flour...	"	1,420 00, " ..	" "
" 25.	100 " ...	"	715 52, " ..	" "
" 31.	81 bales cotton.	"	5,370 04, d. s..	" "
Aug. 8.	50 "	"	3,410 60, 20 d. s..	A., C. & N., Allen, Copp & Nesbit.
" 10.	200 bbls. flour...	"	1,394 23, 15 " ..	Merch'ts' Nat. B'k.
" 10.	100 " ...	"	697 08, "	" "
" "	30 B. C.....	E. & P. D...	2,492 25, 20	A., C. & N., Allen, Copp & Nesbit.
" 12.	500 bbls. flour ..	G. W. D....	3,175 70, 15	Merch'ts' Nat. B'k.
" 13.	200 " ...	"	1,394 21, "	" "
" 13.	31 B. cotton...	"	2,119 93, 20	A., C. & N., Allen, Copp & Nesbit.
" 18.	500 bbls. flour...	"	2,873 13, "	Merch'ts' Nat. B'k.
" 20.	200 " ...	E. & P. D...	1,397 72, "	" "
" "	29 B. cotton....	"	1,939 12, "	A., C. & N., Allen, Copp & Nesbit.
" 21.	300 bbls. flour...	G. W. D....	2,096 60, "	Merch'ts' Nat. B'k.
" 24.	200 " ...	"	1,138 88, "	" "
" 25.	300 " ...	"	1,708 35, "	" "
" 27.	200 " ...	National....	1,216 53, "	" "
Sept. 1.	500 " ...	G. W. D....	3,079 87, "	" "
" 2.	500 "	"	3,222 53, 20 d. s..	" "
" 5.	82 B. C.....	"	5,805 70, " ..	A., C. & N., Allen, Copp & Nesbit.
" 9.	66 "	"	4,298 08, " ..	Merch'ts' Nat. B'k.
" "	30 "	"	2,167 76, " ..	A., C. & N., Allen, Copp & Nesbit.
" "	500 "	"	2,862 62, " ..	Merch'ts' Nat. B'k.
" 12.	38 "	"	2,779 41, " ..	" "
" 16.	96 "	"	6,808 87, " ..	{ 48. Merch'ts' Nat. B'k. { 48. A., C. & N., Allen, Copp & Nesbit.
" 18.	67 "	"	5,225 08, " ..	Merch'ts' Nat. B'k.
" 19.	37 "	"	2,849 45, " ..	" "
" 22.	500 bbls. flour...	"	3,416 60, " ..	" "
" "	50 B. cotton....	"	3,657 82, " ..	A., C. & Nesbit.
66				
Sept. 23.	40 B. cotton....	G. W. D....	3,168 25, 10 d. s..	Merch'ts' Nat. B'k.
" "	43 "	"	3,112 68, 20 " ..	A., C. & Nesbit.
" 30.	60 "	Continental..	4,191 79, "	" "
Oct. 3.	50 "	"	3,594 78, "	Merch'ts' Nat. B'k.
" "	43 "	"	3,320 37, 10	" "
" "	20 "	"	1,451 43, 20	A., C. & Nesbit.
" 10.	60 "	"	4,400 34, 10	Merch'ts' Nat. B'k.
" "	72 "	"	5,287 84, 20	" "
" 15.	77 "	"	5,547 96, 10	" "
" "	125 "	"	8,806 21, 20	" "
" 16.	67 "	"	4,849 90, "	" "
" 23.	29 "	"	2,712 26, 5 d. s..	" "
" "	84 "	"	6,048 42, 10 " ..	" "
" "	47 "	"	3,449 00, 15 " ..	" "
" 24.	141 "	G. W. D ...	10,162 83, 20 " ..	State Bank.
" 28.	105 "	Continental.	7,145 88, 10 " ..	A., C. & Nesbit.
" 30.	113 "	"	7,622 82, 20 " ..	Merch'ts' Nat. B'k.
Nov. 2.	67 "	"	7,443 17, " " ..	" "

Statement referred to as Exhibit A, &c.—Continued.

Date.	Bales cotton etc.	Line shipped by.	Drafts & time.	Bank sold to.
1874.				
Nov. 4.	139 B. cotton...	E. & P. D...	9,167 68, 10 d's ..	Merch'ts' Nat. B'k.
" 7.	91 "	"	6,311 19, 20 " ..	" "
" 11.	170 "	"	11,947 43, " " ..	" "
" 13.	95 "	"	6,499 15, 10 " ..	A., C. & Nesbit.
" 17.	155 "	"	11,389 06, 20 " ..	Merch'ts' Nat. B'k.
" 18.	83 "	"	5,587 14, "	"
" 24.	131 "	Continental	8,913 92, "	"
" 27.	127 "	National ...	8,583 19, "	"
De'r 3.	139 "	E. & P. D...	9,255 00, "	"

Yours, respectfully,

NORVELL & CO.,
Per SANDERS.

67 EXHIBIT B.

A. P. R., N. P. 12, 7, '74.

$11,947$\frac{43}{100}$ ST. LOUIS, *Nov'r 11th*, 1874.

Twenty days after sight pay to the order of ourselves eleven thousand nine hundred and forty-seven $\frac{43}{100}$ dollars, value received, 170 bales cotton, bill lading attached.

No. 8049.

NORVELL & CO.

To M. KUHN & BRO.,
Philadelphia, Pa.

(Endorsed:)
Norvell & Co. pay J. H. Watt, esq., cas., or order.

ROBERT EAGLE, *Cas.*

Across the face:
Accepted Nov. 14, 1874.

M. KUHN & BRO.

68 EXHIBIT C.

(Duplicate bill of lading.)

[T. A. Lewis, gen'l manager, Indianapolis, Ind., Erie and Pacific despatch, authorized agents of Atlantic and Great Western and Erie Railway Companies.]

Contents of package unknown.

(Vignette.)

No. .] ST. LOUIS, *Nov.* 11, 1874.

Received from Norvell & Co. the following package, contents unknown, in apparent good order, viz:

Marks.	Articles.	Weight subject to correction.
P. & H., 26 B. C.—W. K. J. $\frac{14}{15}$ B. C.	One hundred and seventy bales compressed cotton....	79,950

To order Norvell & Co.
Notify M. Kuhn & Bro., Philadelphia, Pa.

Bill of lading from St. Louis to Philadelphia.
1st class * * * per 100 lbs.
2 " * * * " "
3 " * * * " "
4 " " 60 cts. " "
* * * per bbl.
* * * per bale.

69 Marked and numbered as per margin, to be transported by the Erie and Pacific Despatch and the steamboats, railroad companies, and forwarding lines with which it connects, until the said goods or merchandise shall have reached the point named in this bill of lading, on the following terms and conditions, viz: (Then follow certain immaterial conditions, the bill of lading concluding as follows): This contract is executed and accomplished and the liability of this company as common carriers thereunder terminates on the arrival of goods or property at the station or depot of delivery (and the companies will be liable as warehousemen only thereafter), and unless removed by the consignee from the station or depot of delivery within twenty-four hours of their said arrival, they may be removed and stored by the company at the owners' expense and risk.

NOTICE. In accepting this bill of lading the shipper or the agent of the owner of the property carried expressly accepts and agrees
70 to all its stipulations, exceptions, and conditions.

In witness whereof the agent hath affirmed to 2 bills of lading of this tenor and date, one of which being accomplished the other to stand void.

F. D. RUSSELL, *Agent.*

MEM.—Across this bill was written the word "Duplicate.".

71 EXHIBIT D.

MERCHANTS' NAT'L BANK, ST. LOUIS, MO.

Memorandum of drafts drawn by Norville & Co., on M. Kuhn & Bro., Phila., and purchased by Merchants' Nat'l Bank of St. Louis, their date, time for which they are drawn, and their respective amounts.

Date.	Time for which drawn.	Amount.	Date.	Time for which drawn.	Amount.
1874.			1874.		
Ap'l 16.	10 days' sight	1,336 77	Aug. 12.	20 days' s't	2,779 41
" 22.	"	2,245 48	16.	"	3,404 44
" 28.	30 days' s't	3,297 00	17.	"	5,225 08
May 1.	"	3,796 50	19.	"	2,849 45
" 8.	"	4,130 85	22.	"	3,416 66
" 14.	"	7,560 61	24.	10 days' s't	3,168 25
" 15.	"	350 01	29.	20 "	3,112 68
June 8.	10 days' s't	2,426 54	Oct. 2.	10 "	3,320 27
" 15.	"	6,614 80	"	20 "	3,592 78
" 22.	"	3,593 61	10.	10 "	4,400 34
" 30.	15 days' s't	8,071 63	10.	20 "	5,287 84
July 7.	20 days' s't	4,223 90	16.	" "	4,849 90
15.	"	3,497 77	15.	" "	8,806 21
24.	15 days' s't	1,420 00	22.	5 "	2,112 26
"	"	3,397 28	"	10 "	6,048 42
25.	"	715 52	"	15 "	3,449 00
30.	"	5,370 04	30.	1 "	1,880 16
Aug. 8	"	1,394 23	29.	20 "	7,622 82
10.	"	697 08	Oct. 31.	" "	4,473 17
12.	"	3,175 70	Nov'r 4.	10 "	9,167 68
13.	"	1,394 21	6.	1 "	2,550 00
18.	20 days' s't	2,873 13	7.	20 "	6,311 19
20.	"	1,397 72	"	3 "	2,350 00
72			73		
Aug. 21.	20 days' s't	2,096 60	Nov. 11.	20 days' s't	11,947 43
24.	"	1,138 88	17.	" "	11,389 06
25.	"	1,708 35	18.	" "	5,587 14
27.	"	1,246 53	24.	" "	8,913 92
Sept. 1.	"	3,079 87	27.	" "	8,583 19
2.	"	3,222 53	Dec'r 3.	" "	9,255 00
9.	"	4,298 08	Oct. 15.	10 "	5,547 96
9.	"	2,852 27			

74 EXHIBIT E.

This exhibit consisted of a number of letters from the plaintiffs at St. Louis to the Bank of North America at Philadelphia, referring to drafts on Kuhn & Bro., which were enclosed for collection, beginning with a letter of 8th June, 1874, and including the letter of instruction which accompanied the draft in controversy in this suit. The Bank of North America was instructed by each letter to retain the bills of lading which accompanied the drafts until the latter were actually paid.

75 The said plaintiff then offered in evidence the bill of exchange aforesaid drawn by Norvell & Co. on Kuhn and Brother, dated Nov. 11, 1874, 20 days' sight, for $11,947 43/100, endorsed Norvell & Co., and accepted Nov'r 14, 1874, by M. Kuhn & Brother, and protest of same.

JAMES E. YEATMAN sworn:

I reside at St. Louis and am the president of the Merchants' National Bank (original and duplicate bill of lading, and also bill of exchange, handed witness). This draft for $11,947.43 against 170 bales of cotton, with bill of lading attached (original, I mean), was presented to me at our bank. This (original) is the bill of lading; I am confident it is the same, for I see the impress of the draft on the face of the bill of lading. This draft was presented on the 10th of Nov. for 150 bales. On the 11th the draft, with bill of lading for 170 bales, was presented. The cashier said there are 20 bales more. I said, that is no objection. The
76 draft was purchased and sent on to our correspondent, the Bank of North America. I instructed the cashier to instruct the Bank of North America to hold the bill of lading until the draft was paid. The arrangement was that we would take the drafts of Norvell & Co., holding the original bill as our security; Kuhn and Norvelle acquiesced that the cotton was to be our security.

In the month of June, 1874, I made the arrangement with Mr. Mark Kuhn, of Kuhn & Bro., and Mr. Norvell, in St. Louis, that we would purchase a line of drafts up to $50,000, drawn by Norvell & Co. on Kuhn & Bro., with the original bills of lading attached, and that our bank should hold the bills of lading until the drafts were paid. The cotton was to be our security until the payment of the drafts. The amount of the drafts was to be the cost of the cotton and expense, which were paid by the money got from the bank. The line of discount was to be $50,000, cotton and bill of lading to be given up only on the payment of the draft.

77 This arrangement was made in June, 1874, at St. Louis. Prior to that time I had purchased drafts with bills of lading, in which cases we surrendered the bill of lading on acceptance. After June we instructed the Bank of North America only to deliver the bills of lading on payment of drafts.

I next saw this original bill of lading in April, 1875, at Mr. Junkin's office. I then first noticed the imprint of the copying of the latter into the draft and of draft on the bill of lading. I came on to Philadelphia Dec'r, 1874, in consequence of the protest of the draft, and reached here Dec'r 9, 1874. I went to the Bank of North America and saw Mr. Watt, the cashier, and there I saw the bill of exchange with the duplicate bill of lading attached. This duplicate is not negotiable. The bill of exchange has not been paid.

Cross-examined:

I received a telegram on Dec'r 7th notifying me of the protest. I

78 heard nothing from the time of the receipt of the draft by the Bank of North America until I received the telegram.

On Dec'r 9 I visited the bank, and then for thefirst time saw the duplicate. Our transactions with Kuhn had been very large; over $200,000. In the spring of 1874 I inquired as to Kuhn & Bro., of the Bank of North America, and their answer was unfavorable as to their responsibility, and we then detained the cotton until payment. This original bill of lading was gotten from Mr. Graffly, representing the North Pennsylvania Railroad Company, who are agents for the transportation lines, and is produced from their custody. I knew the bills of lading were issued in sets of two, and on the originals the word "original" is marked. The word "original" is not marked on this one. When the draft was discounted I didn't inquire where the other bill of lading was; I thought the other was used for insurance and notice. I didn't know how the duplicate was marked; as to what should be
79 done with the duplicate was discussed with Norvell & Co., and it was understood it was to be used for insurance. None of the drafts ran higher than 20 days. In April and May they did sometimes.

Ques. What was the communication you received from the Bank of North America?

Ans. It was such as to make us feel that we needed the cotton as security. It was May 12, 1874, we sent the letter to the Bank of North America; May 16th the bank wrote to us: "We do not know the party named in your president's letter of the 12th, and have not much information about them; they are in the liquor trade and have but small capital, said to be about $2,000."

Re-examined:

The general understanding between Norvell, Mark Kuhn, and myself was, that the duplicate was sent so that Kuhn & Bro. might show that the cotton was coming to them when the applied for insurance. I had a conversation as to Kuhn's standing with Kuhn himself and Mr.
80 Weygand, of the Citizens' Bank. The duplicate bill was generally marked "duplicate," and not negotiable. Some of them did not have "not negotiable" marked on them, but always written or printed duplicate.

The 2 bills of lading, original and duplicate, of Nov'r 11, 1874, for 170 bales, marked 144 W. D. I., and 26 I & H., offered in evidence and admitted.

81 [F. A. Lewis, gen'l manager, Indianapolis, Ind., Erie & Pacific Despatch; authorized agents of Atlantic and Great Western and Erie Railway Companies.]

Contents of packages unknown.

No. .] (Vignette.)

ST. LOUIS, *Nov.* 11, 1874.

Received from Norvell & Co. the following packages, contents unknown, in apparent good order, viz:

Marks.	Articles.	Weight, subject to correction.
26 B. C., W. K. I. 1/1/0 B. C.	One hundred and seventy bales compressed cotton....	79950

To order Norvell & Co.
Notify M. Kuhn & Bro., Philadelphia, Pa.
(Endorsed:) "Norvell & Co."
Deliver to Miller & Brother or order.

M. KUHN & BROTHER.
MILLER & BROTHER.

Bill of lading from St. Louis to Philadelphia, Pa.
1st class x x x per 100 lbs.
2 " x x x " " "
3 " x x x " " "
4 " x x x 60 cts. " " "
x x x per bbl.
x x x " bales.

Marked and numbered as per margin, to be transported by the Erie and Pacific Despatch, and the steamboats, railroad companies, and forwarding lines with which it connects, until the said goods or merchandise shall have reached the point named in this bill of lading, on the following terms and conditions, viz: (then follow certain immaterial conditions, the bill of lading concluding as follows:) This contract is executed and accomplished, and the liability of this company as a common carrier thereunder terminates, on the arrival of goods or property at the station or depot of delivery (and the company will be liable as warehousemen).

82

83 (Duplicate bill of lading.)

[F. A. Lewis, gen'l manager, Indianapolis, Ind., Erie & Pacific Despatch; authorized agents of Atlantic and Great Western and Erie Railway Companies.]

Contents of packages unknown.

No. —. (Vignette.)

ST. LOUIS, *Nov.* 11, 1874.

Received from Norvell & Co. the following packages, contents unknown, in apparent good order, viz:

Marks.	Articles.	Weight, subject to correction.
26 B. C. W. H. I. $\frac{1}{16}$ B. C.	One hundred & seventy bales compressed cotton.....	79950

To order Norvell & Co.
Notify M. Kuhn & Bro., Philadelphia, Pa.
(Endorsed:) Norvell & Co.
Across the face:
Duplicate. Not negotiable.

Bills of lading from St. Louis to Philadelphia, Pa.
1st class x x x per 100 lb.
2 " x x x " "
3 " x x x " "
4 " x x 60 cts. " "
" " x x x per bbl.
" " x x x " bale.

Marked and numbered as per margin, to be transported by the Erie & Pacific Despatch, and the steamboats, railroad companies, and forwarding lines with which it connects, until the said goods or merchandise shall have reached the point named in this bill of lading, on the following terms and conditions, viz: (then follow certain immaterial conditions, the bill of lading concluding as follows:) This contract is executed and accomplished and the liability of this company as a common carrier thereunder terminates on the arrival of goods or property at the station or depot of delivery (and the company will be liable as warehouseman).

84

85 EDWARD S. MUSTIER sworn:

Reside No. 1935 N'th 19th street. Salesman, with W'm. H. Horstman. In 1874 I went to Chester to find the cotton, and found it in the wareroom of Shaw & Esrey—101 bales; 7 in the warehouse of Pennel and Bro., and 94 in the warehouse of Shaw & Esrey, marked W. D. I. They were pointed out by the man in charge. Was present when the marshal replevied the bales marked W. D. I. I went to Chester at the request of Mr. Sparhawk.

Cross-examined:

On Friday, Dec. 11, 1874, was the first visit to identify. The bales I saw were unopened. Pennell & Bro. run the boat to Chester. The 101 bales had not been used. I was first employed Dec'r 9th or 10th. I was spoken to by Mr. Sparhawk, on behalf of the Merchants' Bank of St. Louis.

86 HUGH SHAW sworn:

94 bales were replevied in our warehouse and 5 or 7 in the packet storehouse, marked W. D. I. Our firm is Shaw & Esrey. Value of the cotton was 13⅜ per pound. About 412 pounds to the bale. Cotton runs from 400 to 450 pounds per bale. Average was about 425 pounds, if I remember right.

Cross-examined:

I bought the cotton from Miller & Bro., through James E. Brown, in the latter part of November, 1874—on the 21st of Nov'r. It was then in transit. I bought by sample. We are buying large quantities. The bargain was made Nov. 21, 1874. The cotton was then in transit. It began to arrive at my mill about the 5th or 6th of December. The manifest of the steamboat co. will show this. At the time of the replevy I had used a quantity of the 143 bales. When I bought I had no suspicion that any one else had a claim to the cotton. Have bought many a hundred bales this year in the same way.

Re-examined:

87 My partner saw the cotton the Wednesday before November 21st. I bought on Saturday. The cotton I bought as Texas cotton, shipped from St. Louis. Didn't know who owned the cotton. Brown asked 14¼ or 14½ cents per pound first. Falling market. It was a cash transaction. Miller & Bro. gave the security for us in this suit. They agreed to indemnify us. They are defending this suit. Cotton was usually bought at 30 days, and we got this cheaper, therefore, than we otherwise would. We had a running account with Miller and Bro. Don't know how I actually paid for it. Think there was a little balance due Miller & Bro. when the replevin was made. What I said on the former trial was correct; if I said the price was 14 cents, that was what was paid.

Wagner's Statutes of Missouri offered in evidence. Vol. I, page 220, sections 6 and 7, read and admitted. (Prout same.)

88 And the said defendants, to maintain the issue on their part, called—

ANDREW H. MILLER sworn:

Member of the firm of Miller & Bro.; our business is the general commission business. Have been in business for many years at No. 244

N'th 3rd street. Know M. Kuhn & Bro., who were in the liquor and commission business. They told us they received cotton in exchange for goods. They received large quantities of cotton.

(Orignal bill of lading shown witness.)

That's my signature (i. e., to the endorsed order). Got possession of this bill on the 14th of November, 1874, from Kuhn & Bro. Mr. Moses Kuhn brought the bill to me, and wanted to put the goods on sale. He asked an advance on 170 bales. On Saturday, Nov. 14, we advanced $8,500 upon the 170 bales, and got from them that bill of lading. Put samples of the cotton into the hands of James E. Brown, brokers. Samples are types of each bale received by us at the time we advance in order to see the quality. We sent the bill of lading to the North
89 Pennsylvania R. R. Co., deposited it with them and took their receipt, which we have. It was Saturday, Nov. 14, on the same day we advanced $8,500 on 170 bales. Mr. Brown, after several interviews, submitted an offer of 14c. for 143 bales of W. D. I.; conferred with Kuhn as to accepting it. Our nett commissions were 2½ per cent., but we submitted to a rebate of ½ per cent., because Kuhn threatened to take the business away. Didn't see Shaw & Esrey personally. The completion of the arrival of the cotton according to the weigher's certificate was Nov. 28. It began to arrive about Nov. 21st. The average date of arrival was Nov. 24. Usual time of transportation is about a week. The cotton was all delivered, and they paid Dec. 2nd, 4,700, and on Dec. 16th, $6,508.64.

Cross-examined:

Joseph W. Miller, J. Harry Miller, and myself composed the firm. I conducted the business almost exclusively in 1874. There was my son, Mr. Frost, bookkeeper, my second son Ewing, and a porter engaged in the business at that time.

90 The plaintiff's counsel then asked the witness how long he had known Mr. Kuhn & Bro.; to which question the counsel for the defendants objected. and the court having asked the purpose of the question, the plaintiff's counsel stated the purpose to be to prove that M. Kuhn & Brother were thieves, and were known by the witness to be such, and that, in the course of the dealings of the witness's house with them a dishonest abstraction of a bill of lading like the present, and under circumstances like the present, had occurred to the knowledge of the witness.

The defendants' counsel objected on the ground of irrelevancy, and that the question was not cross-examination. But the court admitted the evidence, and on the counsel of the defendants excepting, sealed this bill of exceptions.

Witness resumes:

Have known and done business with Mr. Kuhn and Brother for five years. Their store was 3rd street near Arch and Race street, be-
91 low 3rd—two or three squares from us. I sold them liquor at one time and cotton for them at another. They suspended April, 1871, owing us about $1,000. We extended their payment from 8 months to 2 years, and took four notes, which were all paid in full with interest; considered it quite an honorable failure. Notes were endorsed by Simon Teller. The cotton they said they received in exchange for goods, and passed through St. Louis, where they got bills of lading, and we understood it was their cotton. Didn't know whether they had paid for it. Transacted business with them in 1874 to the amount of nearly $100,000, and advanced on both original and duplicate bill of lading.

In the beginning of the year I advanced on originals. Don't know when we ceased to receive originals. We did cease to get originals, but can't tell the date. They brought this bill of lading and asked an advance, which we granted. Sent the bill to the depot, and received receipt from the company. The cotton on its arrival was delivered to us, and
92 we sold it and accounted to them for the balance. Only knew them as commission merchants from their sign. Didn't know they were pushed for money. They didn't tell us they had no money or capital. They failed in 1871 much to their credit, which was a great recommendation to us. The last compromise note was paid to us June 4, 1873. We advanced to them on cash terms 6 and 7 per cent. interest and 2 per cent. commission nett. All the cotton in summer of 1874 came from Norvell & Co. Didn't know who Norvell & Co. were; didn't ask, nor were we told. Thought he was their agent for transshipment of it from the place where they bought it through St. Louis.

The plaintiff's counsel having pressed the question, i. e., "Please state what did Kuhn & Bro. tell you of the source from which they derived the cotton represented by the bill of lading, and the manner in which they had paid for them, and what Norvell & Co.'s relations to them were," the admission of the evidence was objected to by defendant's counsel as irrelevant and hearsay. The learned judges overruled
93 the objection and admitted the question. Whereupon defendant's counsel excepted, and the learned court sealed this bill of exceptions.

Kuhn said he was exchanging liquor for cotton & gathering up the cotton in wagons. I had no knowledge of Norvell's relations with Kuhns. I didn't know what Norvell's business was.

The plaintiff's counsel having pressed the question, "State particularly your whole connection with and knowledge of a bill of lading brought to you by Kuhn & Bro., October 27, 1874, for 141 bales of cotton," and the witness having stated that he remembered this transaction, the question was objected to by the defendant's counsel. Whereupon the counsel of the plaintiff stated that this was one of the series of shipments specified in the exhibit annexed to the commission to St. Louis.

The defendant's counsel objected to the question as irrelevant, not proper cross examination, and because there is nothing to indicate
94 that the witness's knowledge of a transaction said to have occurred Oct. 27, 1874, can affect him with guilty knowledge of the alleged illegal transfer of the bill of lading, which was not issued until Nov. 11, 1874.

The learned judges overruled the objection. Whereupon the counsel for the defendants excepted, and the court sealed this bill of exceptions.

Oct. 27, 1874, Kuhn brought to us bill of lading for 141 bales, requesting $7,500 or $8,000 advance. I gave him a check for $6,000, received the bill, sent it to the depot, and received the company's receipt Oct. 28. I received word from the railroad company that the cotton had been received. I went up to the depot and was told the bill of lading had been stopped. On my return from the depot I met Mr. Kuhn, who brought me a certified check on the Citizens' Bank for $6,000. We got the bill of lading for him, sent our receipt to the railroad com-
95 pany and got the bill. We sent the bill of lading to Mr. Kuhn, who said he would see me in a few hours about it.

Shortly after my attention was called to an advertisement describing this bill, and headed "stolen," telling persons not to advance on it. I saw then the president of the Farmers and Mechanics' Bank, Mr. Lewis,

at Kuhn's request, and told him that Kuhn wanted an advance from us on this bill, and asked him if he had any claim. He said he had none. After the interview I went to my office, saw Kuhn, and gave him a check for $8,000 on this bill as an advance. The cotton was then received, sold, and accounted for. That is as full as I remember.

Copy of the advertisement was here read by the witness, as follows: "STOLEN.—All persons are cautioned against purchasing or making advances on a certain bill of lading for 141 bales of cotton shipped by Norvell & Co., of St. Louis, to their order, and by them endorsed,
96 per Great Western Despatch Fast Freight South Shore Line, via Erie, to Philadelphia, the said bill of lading having been stolen."

I went personally to the railroad company on the morning of the 28th. It was before Kuhn & Bro. returned the $6,000. Saw Mr. Clark. Don't remember if Mr. Clark said that the bank held it. He said they had notice that the cotton had been stopped. Didn't tell me that the bill had been stolen. Didn't mention the bank. I came back to Mr. Kuhn and inquired about the matter, but I did not inquire of railroad co. The first information I had that the bank had anything to do with it was when Kuhn brought me the $6,000 and got the bill of lading. He then told me to see the bank. Am sure that I didn't go to the railroad depot on afternoon of the 27th. As I came back from the railroad company Kuhn came to the store, said there was trouble, and that he wanted the bill again.

97 He reimbursed me with this check (No. 1477, certified). Never before received checks from Kuhn & Bro. The checks were always the other way. Don't remember if I received & held the check until I got the bill; sent up right away and got the bill back. Nothing occurred to make me get the bill myself and take the receipt. Think I next saw Kuhn after an hour or two. Meanwhile I saw Mr. Lewis. First intimation I learned who held the bill of lading was seeing the advertisement. We went down at the request of Mr. Kuhn to the Farmers & Mechanics' Bank to see whether I could advance on it. Kuhn asked me to go to the Farmers & Mechanics' Bank and be satisfied that I would be justified in advancing on it. Didn't know at that time that the bank claimed that it had been stolen from them. I didn't learn that at any time. When I saw Mr. Lewis I said I was requested to advance on it, and asked him whether the bank
98 had any claim upon it. Mr. Lewis said he had no claim upon it; that Kuhn had paid the draft, and they had taken off the discount. I hadn't any idea that Kuhn had stolen it; on the contrary, I was totally ignorant that Kuhn was a thief. Had seen the advertisement when I went there. I understood that Mr. Lewis had put it in. Mr. Lewis didn't tell me that a bill had been detached from the draft, and I didn't agree with him as to the right to detach a bill of lading.

Don't remember any conversation about a stolen horse. Didn't know that the bill had been attached to a draft. Something of this had been said by Mr. Lewis. Went away from the bank with no impression that the bill of lading had been stolen. Mr. Lewis did not tell me that the bill of lading had been given to him by the Kuhns that morning; said that the draft had been paid. Went home; spoke to my
99 brother and Mr. Gummere; then I met Mr. Kuhn and consummated the negotiation. I don't remember that Kuhn told me he had the right to detach, and did detach the bill of lading. Don't remember that I said so at the former trial.

Question. When you were examined in regard to this matter before did I not ask you this question and did you not make this response:

"Q. I want your recollection, as clearly as you can state it, of the whole thing, of your whole transaction in regard to that one which was in possession of the Farmers & Mechanics' Bank, giving the date, if you can, the amount, and the marks.

"A. The only one which I can remember which was in the possession of the Farmers & Mechanics' Bank was one that our attention was directed to it. I can't remember now what brought it to our attention first; but the impression upon my mind was, that it was a ques-
100 tion as to whether Kuhn had a right to the bill of lading which he presented to us, and, therefore, we suspended action upon it until we were satisfied that he had a right. My impression was, that he had claimed a privilege of withdrawing the bill of lading upon the acceptance of the draft, and, when I heard from Mr. Lewis that it was all settled correctly, we went into the transaction and made the advance."

Question. Did I not during that same examination ask you the questions which I am about to read, and did you not then reply as follows:

"Q. And what did Mr. Kuhn say in regard to the charge that there had been a substitution of the bill of lading?

"A. He told me it was a——he told me it was some question in regard to these bills of lading—didn't—don't remember what he told me; first my—I can't give his words or what he told me. He said that it had all been made right.

101 "Q. Did you not tell him you had seen the advertisement which had charged that the bill of lading had been stolen?

"A. I don't think I did at that time.

"Q. When did you?

"A. I think I did the next day possibly; I don't remember.

"Q. What did he say?

"A. Well, it was a question with me—with him as to——

"Q. What did he say?

"A. My recollection is that he claimed he had a right to it.

"Q. Had a right to what?

"A. To the bill of lading.

"Q. In what way?

"A. On the acceptance of his draft.

"Q. And he had a right to substitute another one for it? Did he claim that right?

"A. I don't know—I don't think—I don't know whether I knew that at the time."

Question. Is it not your belief that these are your answers?

(Objected to.)

102 Question. Is it not your present recollection as to what the answers were?

A. I have explained to the court about what was then in my mind at that time. I do not know.

Quest. Did not Mr. Kuhn, at an interview subsequently to the 28th of October, claim that he had a right to take that bill of lading off the draft when you talked to him about it?

Ans. I do not remember.

The bill for 141 bales was an original—didn't know the difference at the time between originals and duplicates. Towards the end of the transactions we got originals. Mr. Wilson, freight agent, told me it was better to get originals.

It was about noon, Nov'r 14th, when Kuhn came with the bill of lading. The samples made a bulk of 2½ feet long and two feet thick; sam-

ples always come to the store. I advanced $8,500 at once. That day I went to reading at the Academy of Music, and when I came back my son suggested that I should telegraph. I did so towards the close
103 of the day. Don't remember that I ever telegraphed before. There was nothing connected with the transaction of Oct. 28 that made me believe it was a forgery. The telegraph we sent was as follows:

"PHILA., *Nov.* 14, 1874.

"T. D. RUSSELL.

Ag't of the Erie & Pacific Dis. R. R., St. Louis, Mo.:

"Is bill of lading for the 170 bales cotton shipped Nov. 11, by Norval & Co., correct? Answer.

"MILLER & BRO.

"Answer, if on Sunday, to 512 North 6th st."

We telegraphed because I suppose we were particularly cautious that day. There had been cases in which we had not telegraphed, not on duplicates. It is not my custom to mark in my book that the bills are originals. It was not our custom to write in our book whether original or duplicate. We got one original bill after Oct. 27 & before Nov. 14, 1874. This was for 139 bales, and we entered it in our book, "Shipped Nov. 4, original bill of lading received." We got one other bill for 84 bales, Oct. 26, & we entered in our book as original. The one
104 in this suit is entered on our book "Nov. 14, for 170 bales," & has written on its face "Not marked duplicate. N. P. R. W. Co. says it is correct." This is an entry in the book made Nov. 14. We entered this I suppose because we desired the original at that time. We had changed the dealings and now desired originals. I marked one referred to because I suppose we were anxious to obtain originals with the Kuhns.

In this case I got the bill about noon and put the cotton in James C. Brown's hands to sell. We did not telegraph to Norvell & Co. Did not know them. Did not know Russell; saw his name on bill of lading; Norvell & Co.'s name was there also. Had no reason to suppose bill of lading was a forgery. I suppose sending telegram was an excess of caution. We had nobody else to telegraph to, and we did not think of telegraphing to Norvell & Co. We did not know anything about these people at that end of the line, and who could we apply to? We did not know what bank the draft came to.

105 I got an answer from St. Louis, Nov'r 14 to my telegram The answer was, "Yes, sir; bill of lading for Norvell's cotton is correct."

Last saw Kuhn & Bro. some time in Dec., 1874, before this replevin was issued. Have not heard from them since; don't know where they are. Didn't get paid the $4,700 till Dec. 16th. I do not remember to whom I rendered the account sales; our account stands $1,500 to their (Kuhn's) debt. The indebtedness did not originate till the accounts current were made out. Our commissions were two per cent. The orders were to sell at once. I did receive 155 bales some time in November, shipped by the Erie & Pacific, for which replevin was issued.

Witness resumes:

Last saw Kuhn about Dec. 1, 1874. Never had any settlement with them.

Re-examined:

Been engaged here in business 33 years. I am 54 years old. Never

been on the witness stand before. Have never been accused of receiving stolen goods. Am a married man with a family.

106 Question. In reference to the trial a year ago were you shocked, alarmed, and embarrassed at the questions and the mode in which they were asked?

Answer. I was unquestionably. In regard to the 143 bales with which the Farmers' & Mechanics' Bank has been mentioned, I had not the slightest knowledge of any fact tending to invalidate their (Kuhn & Co.'s) title to the bill. I would do the same thing over again.

Recross-examined:

Witness is directed to turn to his book and see what marks of bills of lading are in it since April, 1874.

The first transaction in June, 1874, was on the 3rd, of 44 bales; next was June 8th, 34 bales. Can't tell whether on original or duplicate bill. June 15, 106 bales. That's an original not endorsed by me. June 20th, 21 bales not endorsed by me. June 13, 54 bales on duplicate. Got the 106 bales on a duplicate. July 2, 37 bales on duplicate. July 10, 34 bales. Was our custom to endorse, and they were gene-

107 rally endorsed by Kuhn & Bro. to us. The original in this case is endorsed by both. All were not duplicates that I have mentioned above and that we have looked over.

JAMES E. BROWN sworn:

Know Miller & Bro. Sold Shaw & Esrey cotton in 1874 for Miller & Bro. Was employed to sell to any one Was employed to sell 143 bales marked W. D. L. I sold them to Shaw & Esrey. Mr. Miller employed me some four or five days before I sold. Sold by sample to Shaw & Esrey at 14 cents, market value, for cash. I reported the sale and it was consummated in the usual course of business.

Cross examined:

Place of business is 103 So. Front. Don't remember whether I went to Miller's or was sent for. Mr. Esrey saw the cotton on Wednesday and his partner saw it on the Saturday following. Got the samples between Wednesday and Saturday. Sold it on fifteen days from arrival. Cash sales are ¼ to ½ cent lower than time price. Went to see the cotton at the depot to see if it came up to sample.

108 DAVID S. GRAFFLY sworn:

Am connected with the North Pennsylvania R. R. Co.; was their agent in Dec., 1874. That line was transporting cotton from the West via Erie & Pacific Despatch. Remember delivering the cotton under this bill of lading. Cotton arrived about ten days after leaving Saint Louis. There was nothing peculiar about this transaction. Delivered to the order of Miller & Bro. The bill was deposited, and we gave a receipt for it; have had it in my possession and brought it here in answer to the subpœna; the presentation of this bill was the first intimation I had of the cotton being in transit. I first heard of any controversy when I was required to produce this bill of lading in court.

Cross-examined:

It is usual to give receipts when required before the property arrives; it is not usual in the mass of cases; not always, because bills of lading are not always deposited. Leaving the bill and taking the receipt

109 is the exception; Ellis Clark is my superior; don't remember any

one coming to us from the Bank of North America; when cotton is delayed it is subject to the retention charge.

(Witness produces a bundle of bills of lading, in answer to subpœna.)

Ques. Are these the bills of lading on which the cotton therein mentioned was delivered?

Ans. Where these are originals and duplicates, which duplicates are endorsed. I never saw Norvell & Co. write. I would not require proof of the genuineness of their signature.

HUGH SHAW sworn:

Am one of the defendants. I paid for the cotton as follows: Dec. 2, 1874, on account of Nov. 21st, $4,700. I then purchased 171 bales Dec. 8, and paid on account of that and previous purchases $7,600, on Dec. 12th. That payment of Dec. 12 was intended to pay for the pur-
110 chase of No. 21. Dec. 12th we had paid for it in full. When the time for the credit ran out we got the receipt.

Cross-examined:

The last payment was made on the morning of the replevy. It was replevied at night. On Dec. 18 we paid 13¾c., and Dec. 19th 13½c. for some kind of cotton. Bought these last of James E. Brown for Miller & Bro., for cash; bought on the 8th payable on *on* 12th & 16th; don't know where the cotton came from; knew it as Texas cotton. I don't remember that Miller & Bro. guaranteed us from loss; didn't know that the Bank of North America claimed it; the bank sent for us and asked us if we didn't know we had got a lot of cotton that didn't come straight. I said no; had no knowledge that this cotton was claimed by the bank till one day before the day of payment. I met Mr. Wilson after the payment; have receipts; average weight of bales 459 lbs.

Re-examined:

111 At the time of the last payment had no notice of any adverse claim, only some person came there to look for it; being in Sparhawk's office, we asked and got permission to pay Mr. Miller that day, and I think there was a replevin suit and a bond entered.

The defendants here closed.

The plaintiffs, in rebuttal of defendants' case, then called

JOHN H. WATT. Sworn:

Plaintiffs' counsel proposed to prove that the bill of lading in question was received by the plaintiffs' agent, the Bank of North America, and how it got out of their possession. To which evidence defendants' counsel objected, as not being evidence in rebuttal. The court overruled the objection, and admitted the offer. Whereupon counsel for the defendants excepted, and the learned court sealed this bill of exceptions.

112 Was cashier of the Bank of North America November, 1874. Corresponded with the plaintiffs. Received the bill of lading and draft of Nov. 11th on Nov. 14th. Have not got the letter. Handed the draft & bill to the runner, S. M. Copeland; received it in the morning mail, and delivered it after the opening of the letters. Can't specify such a particular draft. There was nothing to distinguish this from a hundred others. Remember that a bill of lading was attached, but don't remember that it was this one. Charles Ball is the teller. When the

bill is returned it is registered and put in the vault, where it remains until the time of maturity, when the note clerk takes it out. My attention was first called to it the day it matured, as not being paid, and had a bill attached, which one I do not know. I did not examine particularly the bill of lading, because I supposed the same one was attached that was when it was received. My attention was first
113 called to the fact that the same bill was not attached by the bank of St. Louis. I telegraphed the day it matured and was not paid, and in consequence of that received from them a letter, and Mr. Yeatman came on. I had this correspondence, but can't find it. I know of no substitution having taken place.

Cross-examined:

Quest. Haven't the Merchants' National Bank of St. Louis commenced suit against your bank?

Question withdrawn.

CHARLES BALL sworn:

On November 14, 1874, I was teller and note clerk of the Bank of North America. I open the mail in the morning and distribute it. Usual course is to hand the draft to the runner to take for acceptance. I never detached any bill.

114 SAMUEL N. COPELAND sworn:

Was runner of the Bank of North America in Nov., 1874. I presented this draft for $11,000 Nov. 14 to M. Kuhn & Bro. for acceptance. It was on my book. I received the draft and bill from Mr. Ball; entered it on the book, with a memorandum of the date, amount, &c. Then it was put in proper order for my route. Presented it, and it was accepted, in their (Kuhn & Brother's) little private office. Kuhn sat on one side of a little desk, and I on the other, and he accepted it. I should say that Kuhn unpinned it, because a draft wouldn't come so that he could examine it. He accepted it, pinned it back, and handed it to me. Can't say that he substituted another bill; if so, he must have done it before my eyes. I didn't watch them as I would a thief. My eyes were not off him. If he substituted another, it was by slight of hand or legerdemain. Put them in my pocketbook and got back to the bank at 2 o'clock. Was at Kuhn's between 11 and 11½. When I returned I put it in a pigeon-hole, when the note clerk (foreign) takes charge of it. So far as I know, the one I brought back was the same bill of lading that I took there. My attention was first called to the matter a day or
115 two after maturity of the draft. Can't say which was an original or duplicate. Mr. Grant has charge of the pigeon-hole. At Kuhn's there is an office, and then a counting-room. I was in the little back office. I was put on the other side of the table. The table is about three feet wide. I was close to the table; my arm was on it.

To the court. I never allowed a substitution, to my knowledge, of any one paper for another.

Cross-examined:

Never heard of substitution until in court; kept my eye upon Kuhn all the time. Left their office without doubting that I had the proper paper. I don't remember the fact that he unpinned the bill of lading any more than he would have had to examine it. It was necessary to detach the bill to accept. I had reason to be watchful of Kuhn. I

wouldn't have surrendered a draft on his check. Had a bad opinion of them. Banks and bank runners know them. I kept my eye upon him the whole time of the transaction. I saw all he was doing. I had not the slightest doubt that I had the same bill when I came out as when I went in. The substitution couldn't have been done except by sl'ight of hand trick or legerdemain. I started out that day from 10 to 10½ o'clock a. m., and got at Kuhn's at 11 or 11½.

116 CHARLES B. GRANT sworn:

I don't remember this draft. The "December" and figure "4" on it are my figures. It indicates that I had registered it and deposited it in the vault. Can't tell where I wrote it. After acceptance; the day after. It came into my possession when it fell due. No particular remembrance of the bill of lading. Have no knowledge of any abstraction.

WILLIAM MURPHY:

Am assistant to the receiving teller, and register the notes in the morning. The No. 8049 on it indicates it was in my possession. Have no knowledge of any substitution. Don't remember that bill of lading was attached.

SAMUEL N. COPELAND recalled:

(Looks at the entries in his book.) Hadn't much to do that day: 1st, I went to Jamison's; 2nd, to Campbloss; 3rd, to I. V. Williamson on Bank street; 4th, to Mr. Newhouse; and then, I think, I went to Kuhn's, reaching there between 11 and 11½ o'clock.

117 THOMAS SMITH sworn:

Am president of the Bank of North America. Had no knowledge of the matter till my attention was called to it. Had no knowledge of any substitution. Didn't think it was possible until Mr. Yeatman called my attention to it, and the marks copied on the bill.

Cross-examined:

Didn't see Mr. Yeatman until after the trouble when he came from St. Louis. There is correspondence notifying the Bank of St. Louis as to Kuhn's character. As a bank correspondence it is very strong. The Bank of St. Louis have brought suit to make us liable for something we did or omitted in regard to the draft and bill of lading.

SAMUEL N. COPELAND recalled.

When I spoke of watchfulness I referred to the pecuniary responsibility of the Kuhns. I was subpœna'd here a year ago but wasn't examined.

JOHN S. WILSON sworn:

118 Am freight agent of the Philadelphia, Wilmington & Baltimore Railroad. Shipment of cotton from St. Louis comes under my attention. I am indirectly an agent for about 14 lines. Have knowledge of shipments by Norvell & Co. in 1874 from St. Louis. I am indefinate as to dates. We had been carrying cotton for Norvell. Mr. Miller called as to the arrival of several lots of cotton and showed the bill of lading, and after conversation, in answer, I said the cotton was not in. He showed me duplicates, and I said it was dangerous ground

to be advancing upon duplicates in case the original should turn up. It was in response to an inquiry of his when he had two or three bills in his hand and was inquiring about the arrival.

Cross-examined:

All that I had anything to do with came by the Continental lines. I had the bills but they were sent to St. Louis. This shipping was in the months of October and November. The following lots of cotton were shipped in October under bills of lading which Norvell & Co. had endorsed, and which Kuhn & Bro. presented to me Oct. 1, '74, 60 bales;
Oct. 2, '74, 43 & 50 bales; Oct. 3, 20 bales; Oct. 10, 60 bales, 72
119 bales, 132; Oct. 15, 27 bales; Oct. 16, 67 bales; Oct. 15, 125
bales; Oct. 23, 29, 47, & 80 bales; Oct. 28, 105 bales; Oct. 30,
110 bales; Oct. 31, 28 bales. These are the dates of the bills of lading, there being a separate bill for each.

All of these lots except three were delivered on duplicate bills to Kuhn & Bro., or their order. Three of the lots, Oct. 15, 123 bales; Oct. 23, 84 bales; Oct. 28, 105 bales, were delivered on bills of lading marked "original" to Kuhn & Bro. or their order. Quite a number were delivered on original bills. Practice was to deliver on duplicates where there was an outstanding original. I told him in the absence of the original the duplicate was good.

R. A. WEST sworn:

Am stenographic reporter. Reported the testimony of the former trial when Mr. Miller was examined.

EDWIN M. LEWIS sworn:

(Plaintiff's counsel proposed to prove by this witness the whole of the conversation between himself and Mr. Miller Oct. 28, 1874, in relation to which Mr. Miller was examined.

Objected to by defendants' counsel because the evidence offered
120 is not in rebuttal of the defendants' evidence, but of the plaint-
iff's, and because it is incompetent for the plaintiff thus to contradict the evidence of Mr. Miller adduced by them.

The court admitted the evidence, and on the counsel for the defendants excepting the court sealed this bill of exceptions.)

I am president of the Farmers' and Mechanics' Bank, and was in 1874. Mr. Miller called and asked me why I had stopped the delivery of the bill of lading.

Q. Will you please state what the whole of that conversation was between you and Mr. Miller?

A. Mr. Miller called on me on the 28th of October, 1874, showing me a bill of lading which he held, and inquired why I had stopped the delivery of the cotton called for in that bill of lading; that he had taken the bill of lading to the North Pennsylvania Railroads Company's office or depot, and they had informed him that I had stopped the delivery, alleging that the bill of lading had been stolen.

I told him that that bill of lading had been received by us attached to a bill of exchange; that we sent the bill of exchange out for acceptance, and that the next day after acceptance we discovered
121 that the bill of lading then attached to the bill of exchange was
an old bill of lading for 50 bales, and that the original bill of lading which should have been attached to the bill of exchange had been detached; that we had promptly telegraphed in every direction to have the delivery of the cotton stopped; given notice to all the railroad

companies, and that I had recovered that very bill of lading from Kuhn & Bro., drawees, that morning. I think I told him also that we had since recovery been paid the amount of the bill of exchange less the discount.

He thought I had no right under the circumstances to have stopped the delivery, or to have endeavoured to stop the delivery; that the bill of lading was in the condition that it then was when I recovered it; was indorsed on the back "Deliver to Miller & Bro., Kuhn & Bro." There was no notice on the bill of lading, and he felt that the cotton was his. I then asked him if he had ever heard of a stolen horse; that I looked upon that bill of lading as I did upon a stolen horse.

We had some further conversation about the circumstances, and not knowing what might be the effect upon me or the bank in case I said anything that would perhaps lead to the supposition that we
122 were charging Kuhn & Bro. with theft or larceny, or whatever it is, I declined discussing that part of the matter any further.

We could not tell where the bill of lading had been detached, whether in St. Louis or here, but I had recovered it from Kuhn & Bro. I recovered the bill of lading from Kuhn & Bro. about 10 o'c'k on the morning of the 28th of October. The bill of lading was brought by a young man, who came from the direction of 3rd street toward us. I was standing on the step of Kuhn & Bro.'s store. He delivered the bill of lading to Kuhn, and I took it out of Kuhn's hands. He was anxious to erase the endorsement, "Pay to the order of Miller & Bro.," which I declined to do. I immediately demanded payment of the money, not knowing what the effect of the endorsement might be. He paid it to me probably in the course of an hour or so, partly in a due bill on the Girard Bank for $10,000, and the rest, about $125, in small notes. The draft was for $10,162.83, at 20 days' sight. I took off the discount; the draft not being then due. When he paid me I gave him back the bill of lading.

In about an hour and a half to two hours afterwards, Mr. Miller called to see me, as I had stated. My recollection of what oc-
123 cur'ed at that interview with Mr. Miller is very clear. It was refreshed because of a conversation with our own counsel that same day. I had but the one interview with Mr. Miller. At that interview he told me that he had been informed at the North Pennsylvania Railroad depot that our bank claimed that the bill of lading had beens tolen; that was the reason he came to see me. I don't remember his speaking of the advertisement in the Ledger. We put it in.

Cross-examined:

No one was present but Mr. Miller and myself. He handed me the bill of lading. He had it in his hands. I am certain of that. I suppose it was between one and two o'clock, certainly after one. I don't recollect that on a former trial I stated it was between 12 and one that he called. It is difficult to fix times. I am giving you about the time. He stated his object in calling was to know why I had stopped the delivery of that cotton—his cotton, he having a bill of lading on which there was no notice—a bill of lading deliverable to order properly
124 endorsed to him. I do not recollect stating before that Mr. Miller's primary object in calling was to know whether there was no objection to his making an advance on that bill of lading. I think the primary object was to know why we had stopped that cotton. That I recollect perfectly well. He may have asked that question.

Q. Did not you state on April 27th, 1875, "He said that he wanted to

learn primarily whether the bank had any claim on that bill of lading"? (Mr. Gowen hands witness a letter from witness to Mr. Gowen of that date.)

A. Yes, I must have said so; but the point that struck me most in the conversation was as to why I had stopped the cotton. But I did state before that the primary object in calling was to ascertain whether the bank had any claim on the bill of lading or on the cotton. I did not accuse to Mr. Miller Kuhn of having stolen this bill of lading. In fact I have no personal knowledge on the subject then as to how he had received it. Mr. Kuhn informed me how it had been done, but whether that was the truth or not, I could not say. When Mr.
125 Miller called, the bank had no claim on the bill of lading. It had been surrendered by the bank to Kuhn on his paying the draft less the discount.

Re-examined:

I told Mr. Miller that this was a stolen bill of lading. I did not tell him that Mr. Kuhn had told me that he had taken it off. I said nothing to convey a charge of theft or larceny, or whatever it is, against Mr. Kuhn. I kept within the line of the law entirely. Mr. Kuhn's explanation was such that it led me to do so by the advice of counsel.

Counsel of both parties agree that the record of the suit of Merchants' National Bank of St. Louis vs. The Bank of North America, C. C. P. No. 4, March T., 1875, No. 961, should be admitted as evidence. (Prout same.)

126 R. A. WEST recalled, and plaintiffs counsel propose to prove by the witness that on a previous trial of the cause Mr. Miller testified as set forth in the extracts from the stenographic notes of his testimony hereinafter recited.

Objected to by defendants' counsel for reasons already stated, and because the plaintiffs cannot affect the defendants' title by declarations alleged to have been made by a witness elsewhere.

The court overruled the objection and admitted the testimony, stating that it was admited simply for the purpose of affecting the credibility of the witness Miller, by showing differences between his present recollection (or want of recollection) and his former testimony, adding that this decision would enable the defendants, if so advised, to give in evidence any other part or parts, or the whole of the witness' testimony on the former trial, to which the defendants' counsel excepted, and the court sealed this bill of exceptions.

127 Cross-examined:

Mr. Miller was examined in the former trial not with great acerbity of manner as I understand it, but at great length; with more energy than you (Mr. Gowen) examine witnesses. He was a witness not the easiest in the world to report, but I gave him his own words. Mr. Ware wrote the testimony in long-hand at my dictation. I afterwards went over his copy with my original notes and corrected his copy. I generally go through it and punctuate it and correct it. Can't state what Mr. Miller said without looking at it. My notes of his evidence read as follows. Mr. Junkin asked this question:

"Q. I want your recollection, as clearly as you can state it, of the whole thing, of your whole transaction in regard to that one which was in possession of the Farmers and Mechanics' Bank, giving the date, if you can, the amount, and the marks.

"A. The only one which I can remember, which was in the possession of the Farmers and Mechanics' Bank, was one that our attention was directed to it; I can't remember now what brought it to our at-
128 tention first, but the impression upon my mind was that it was a question as to whether Kuhn had a right to the bill of lading which he presented to us, and therefore we suspended action upon it until we were satisfied that he had a right. My impression was that he had claimed a privilege of withdrawing the bill of lading upon the acceptance of the draft, and when I heard from Mr. Lewis that it was all settled correctly, we went into the transaction and made the advance.

* * * * * * *

"Q. And what did Mr. Kuhn say in regard to the change that there had been a substitution of the bill of lading?

"A. He told me it was a—he told me it was some question in regard to these bills of lading. Didn't—don't remember what he told me first. My—I can't give his words or what he told me. He said that it had all been made right.

"Q. Did not you tell him you had seen this advertisement which
129 had charged that the bill of lading had been stolen?

"A. I don't think I did at that time.

"Q. When did you?

"A. I think I did the next day, possibly. I don't remember.

"Q. What did he say?

"A. Well—it was a question with me—with him as to——

"Q. What did he say?

"A. My recollection is that he claimed he had a right to it.

"Q. Had a right to what?

"A. To the bill of lading.

"Q. In what way?

"A. On the acceptance of his draft.

"Q. And he had a right to substitute another one for it; did he claim that right?

"A. I don't know—I don't think—I don't know whether I knew that at the time."

And here both sides closed.

130 C. C. U. S., E. D. of Penn'a, October sessions, 1874.

THE MERCHANTS' NATIONAL BANK OF ST. Louis *vs* SHAW & ESRY. } No. 79.

The learned judges are respectfully requested to charge the jury as follows:

I. That the plaintiffs' title to the cotton in controversy was acquired by the transfer to them of the bill of lading under which it was shipped, that the possession of this bill of lading carried with it the title to the cotton only during the transit of the cotton to its destination and for such a period of time thereafter as might reasonably be required to enable the plaintiffs to take charge of it on its arrival, or to notify the carriers that they (the plaintiffs) held the bill of lading; and that if the jury believe from the evidence that neither the plaintiffs nor their agents made any effort to secure the cotton or inform the carriers that the bill of lading had been transferred to them within a reasonable time
131 after the date when, in the ordinary course of business, the cotton was due here, the verdict must be for the defendants.

II. That there is no evidence in the case that the plaintiff made any demand for the cotton, or even informed the carriers that the bill of lading had been transferred to them, until after the draft was protested; and that as against the defendants, who were purchasers for value and in good faith (if the testimony is to be believed), this neglect of the plaintiffs to assert their title precludes them from recovering, and the verdict must be for the defendants.

III. That to entitle the plaintiffs to recover, the jury must be satisfied not only that the plaintiffs were at one time the rightful holders of the bill of lading, but that they were unlawfully deprived of it, and that Miller and Brother acquired it either without consideration or
132 with notice of the want of title of the person by whom it was transferred to them, and that there is no evidence in the case which would warrant such a conclusion.

IV. That if the jury find from the evidence that the original bill of lading for the cotton in controversy was transferred to Miller and Brother by Kuhn and Brother while the cotton was in transit, for a valuable consideration, and without notice to Miller and Brother of any defect in Kuhn and Brother's title to the bill, their verdict must be for the defendants.

V. That there is no evidence in the case which would warrant the jury in finding that Miller and Brother had any knowledge that the original bill of lading was not the property of Kuhn and Brother when the latter obtained an advance upon it from Miller and Brother.

133 To which points the court responded as follows:

To the first: "We decline to give you that instruction."

To the second: "The court cannot give that instruction as expressed."

To the third: "We cannot give that instruction."

To the fourth: "If the fact were so, and there were nothing else in the case, the verdict should be for the defendants."

To the fifth: "We decline to give that instruction in the form in which it is expressed."

And the learned judges further charged the jury as follows:

It is important to inquire whether the Bank of North America lost or parted with possession of the bill of lading negligently or wilfully; for if that were the case, a wrong-doer in possession of it might impart to another a better title than he himself had. But if neither the plaintiffs nor the Bank of North America negligently or wilfully parted
134 with the bill of lading, Kuhn & Bro. could not vest in Miller & Bro. a better title than they, Kuhn and Brother, had.

If you find that possession of the bill of lading was parted with negligently, then the question will be whether Miller & Brother knew any fact from which they had reason to believe that the bill in question was held as security for the payment of an outstanding draft.

The court then reviewed the evidence of the course of dealings, and referred to the evidence of the transaction of Oct. 27th & 28th, 1874, and to the telegraphic despatch sent by Miller and Bro., and left this and the other evidence in the case as bearing upon the question of Miller & Bro.'s knowledge, adding that it was not necessary that the jury should be convinced that Miller & Bro. had any fraudulent intention the matter, but that it was a question as to whether they had not reason to believe that Kuhn & Brother's title was defective.

The court concluded by asking the jury to find specially, if they should see proper, upon the two points of fact on which they afterwards found when the verdict was rendered.

135 And thereupon the counsel of the said defendants did then and there except to the aforesaid charges as above set forth and to the several answers to the points hereinbefore stated, and inasmuch as the said charge and points and answers so excepted to do not appear upon the record, the counsel for the said defendants did then and there tender this bill of exceptions, and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided; but at the request of the plaintiffs' counsel and against the objection of the defendants' counsel, the court directed that the entire charge of the court should be set out in the bill (whereupon the same was done prout the entire charge hereto annexed as part of and incorporated with the bill of exceptions), and thereupon the aforesaid judges at the request of the said counsel for the
136 defendants did put their seals to this bill of exceptions pursuant to the aforesaid statute in such case made and provided.

[SEAL.] W. McKENNAN.
[SEAL.] JOHN CADWALADER.

137 *Charge of the court.*

Judge CADWALADER:

GENTLEMEN OF THE JURY: At the request of the presiding judge, I will state to you our views of this case.

The Merchants' National Bank of St. Louis, on the 11th of November, 1874, discounted for Norvell & Co., of St. Louis, a draft of Norvell & Co., on M. Kuhn & Bro., of Philadelphia, for $11,947.43. It had twenty days to run, and it was secured by appropriation of a bill of lading for one hundred and seventy (170) bales of cotton which was (subject to that appropriation) to become the property of M. Kuhn & Bro.

The bill of lading was to the order of Norvell & Co., and by them endorsed, as was the bill of exchange. The bill of exchange and bill of lading appear to have been inclosed by the Merchants' Bank of St. Louis, to their correspondents, the Bank of North America, in Philadelphia.

138 There is an accidental circumstance which you will recollect; the impression of the bill of lading on the bill of exchange as put into the letter, showing that the bill of lading which accompanied the draft, and with which it was sent to the Bank of North America, was the original and not the so-called duplicate, and there seems to be no dispute that the bill of lading actually mailed with the bill of exchange was the original bill of lading.

There was a so-called duplicate which was marked "not negotiable," and that duplicate, according to the testimony which has been given in evidence, would find its way to M. Kuhn & Co., in Philadelphia. Thus there is every reason to believe and no reason, I think, to doubt that on the 11th of November, or thereabouts, the original bill of lading with the bill of exchange was transferred to the Bank of North America for collection, and the so-called duplicate was transmitted to M. Kuhn & Bro., and there is every reason to believe, and no reason to
139 doubt, that by due course of mail these respective remittances found their way to Philadelphia. The bill of exchange and original bill of lading reaching the Bank of North America on the 14th of November, and the so-called duplicate reaching the possession of M. Kuhn & Bro. on the same morning, or thereabouts.

The effect of these transactions and of letters and other evidence which is before you, was that the cotton was appropriated for the security of

the bank, not merely until acceptance of the bill of exchange, but until actual payment of it. That there was such a stipulation is proved, and, as far as I know, not disputed.

You will observe then that upon the effect of what has been stated the plaintiffs, the Merchants' Bank of St. Louis, had a special property in the cotton, the one hundred and seventy (170) bales in question, for the security not only of the acceptance, but the payment of the bill of exchange. Until, therefore, the plaintiffs voluntarily parted, if
140 they ever did so, with the bill of lading or bill of exchange, or otherwise lost their title to it, they had a special property in this cotton which authorized them to maintain the present action.

It appears that this bill of exchange according to the ordinary and regular course of business, after its arrival in Philadelphia, would have been presented with the bill of lading attached for acceptance to M. Kuhn & Bro., and then would have been retained by the Bank of North America with the bill of lading as a security for payment of the amount that had been advanced to Norvell & Co. on the 11th of November, 1874, by the plaintiffs in this suit. In some way, we will presently inquire how, the original bill of lading was found, on the same 14th of November, in the possession of M. Kuhn & Bro., and the duplicate, so called, was in some way, we will presently inquire how, substituted for the original which the Bank of North America had received from the Merchants' Bank of St. Louis. As the bill of la-
141 ding was negotiable, it becomes very important to inquire whether the possession of it was wilfully or negligently parted with by the Bank of North America as agent of the plaintiffs, the Merchants' Bank of St. Louis, because, if the true owner of the property, through himself or his agent, wilfully or negligently allows the muniments of title, especially such a muniment as a bill of lading, to get out of his possession and into circulation so as to enable a wrong-doer to impose himself upon others as the owner, the true owner's property may be divested and the wrong-doer able to pass the innocent parties a better title than the rightful owner would otherwise have. It therefore becomes very important to inquire whether the Bank of North America wilfully or negligently parted with possession of the original bill of lading, and as that bank were the agents of the plaintiff, and as the means of knowledge were, we think reason and common sense would induce us to expect, that the proof of the truth as far as
142 it could be ascertained, would come from the party who thus had the means of knowledge. Accordingly, the plaintiffs have undertaken to prove how, as far as they were able to show, this bill of lading got out of their possession; and their proof is very simple, very straightforward and regular, and may probably be very satisfactory to you.

In the first place, they produce the president and cashier, which is proper if it were a mere formality, and it is a proper formality, to say that *that* there was nothing known to them to authorize any departure from the regular rules of business. They had no right to part with it as between them and the Merchant's Bank of St. Louis, but, lest innocent persons should suffer, the proof is made that they never authorized nor knew anything about it. Then the subordinates who would have knowledge on the subject are produced. It appears that according to the co urseof business in that bank the correspondence in
143 the morning which it was formerly the cashier's duty to open was opened and assorted for him by the first teller, and that the first teller's duty, according to the course of business, was to give to the run

ner such paper as that in question, which required acceptance, or other current duty during the morning.

The first teller is produced, and he states that nothing was done or authorized by him out of the common course, and we come then in due course to the runner. The runner testifies that he received the paper, including this bill of exchange, with the bill of lading, and that in the course of his morning route, which continued from soon after 10 o'c'k, or in the neighborhood of 11 o'c'k, until towards 2 o'c'k, that in the course of that route, and in the early part of it he believes—I think he says between 11 and half past 11—he took to the counting-house of M. Kuhn & Bro. the orginal bill of lading and bill of exchange, and handed them, folded together, to one of the Kuhns for the acceptance of
144 the draft. He says that Kuhn took them into his hands, looked at them, wrote the acceptance on the bill of exchange and handed back what the runner believed to be the bill of exchange and the bill of lading, and the runner had no reason to doubt and did not doubt, he says, or suspect in any way, the contrary.

Now, from what was afterwards learned, we know two things, first, that the so-called duplicate of the bill of lading was substituted on that very day, the fourteenth, for the original, and that it was on the same day in the possession of Kuhn. You will recollect that according to the evidence there is nobody but Kuhn who could have been in possession of the duplicate to substitute for the original, if it was substituted; and, if the original was in Kuhn's hands on the same day, and if the runner is not mistaken in saying what he took to Kuhn, why the inference becomes one that you will probably have no difficulty in deducing. It is a matter for you, and not for the court; but the inference is, you
145 will probably find an irresistable one that Kuhn, while the runner was there, substituted the so-called duplicate for the original bill of lading.

To complete the chain of proof on the part of the Bank of North America, they have produced the only two persons whose handwriting appears upon the bill of exchange, the two clerks. You recollect one of them put it into the proper pigeon hole in the cashier's department; you have heard the testimony of the other, and both of them state that they have no knowledge of any substitution or change of any kind. Now, so far as proof, affirmative and negative, can reasonably be given, you will say whether it has not been given on the part of the Bank of North America, showing that there was no wilful or negligent parting with this bill

On the question of negligence, you have the testimony of the runner and will judge of it, whether he did not use the ordinary caution that can be expected from a person in the performance of such a duty,
146 and whether any proper care would have guarded against the sleight of hand or whatever it was that substituted the wrongful for the proper bill of lading.

The next fact of importance is that Kuhn & Bro., on the same 14th of November, 1874, during bank hours, as I understand the evidence—there was some idea that it was 12 o'c'k, but I do not know that the hour is important—that Kuhn & Bro., on that same day, transferred the original bill of lading to Miller & Bro., and received an advance of $8,500 upon it.

Now, the precise nature of the transaction as regards Miller & Bro. will be considered somewhat particularly under another head hereafter. For the present, if the plaintiff, The Merchants' Bank of St. Louis, or their agents, neither wilfully nor negligently parted with this bill of

lading, but it was surreptitiously abstracted, the court is of opinion that Kuhn & Bro. could not transfer to them a better title than they themselves had. The facts of that particular case are with the jury; the law, as the court is at present advised, I have stated. A bill of
147 lading is, in certain forms of it, negotiable at common law, and in other forms of it is negotiable by a law of Pennsylvania, passed in the year 1866. Other States have passed laws somewhat different. Louisiana and Missouri have passed laws which use words making a bill of lading negotiable in the same way that a bank note or bill of exchange is negotiable. The Pennsylvania law omits those words, and the court is of opinion that their ommission is to be considered in the interpretation of the act, and that while a bill of lading is to certain intents negotiable, so as to pass the legal title among parties rightfully concerned in it, and so as to enable a wrongdoer, under circumstances such as I have explained, to impose himself on the world as the owner, yet that the rule that applies to a bank note, or bill of exchange, or promissory note is not in Pennsylvania the standard by which to determine the present question. If the true owner, through any fault, ommission of duty, or carelessness of any kind, to say nothing of what is not, of course, a
148 wilful parting, enables a wrongdoer to impose upon the world, then the true owner ought to suffer; but where the bill of lading is merely stolen from him the law does not shift the title through the mere possession of it alone.

The plaintiff's case thus far, if we are right in the law as we state it and in this view of the facts, stands on a very simple footing. The nominal defendants or the real defendants as you may find them, the defendants on the record, Messrs. Shaw & Esrey, appear to have bought through a broker a portion of the one hundred and seventy bales, the portion in controversy here, from Miller & Bro. Now it does not appear that when Shaw & Esery bought, a bill of lading or any muniment of title or anything of the kind was exhibited to them. They bought on samples; the samples had come by rail from St. Louis, and while their purchase was an innocent and ordinary one in the market, there was nothing to show title by documents such as a bill of
149 lading or anything else.

Their case, therefore, if there was nothing intervening, is simply that of a party who innocently buys what did not belong to the seller, and every man knows that he can get no better title than the seller, so that so far as Messrs. Shaw and Esry's personal relations to the property in question are concerned they could acquire no title as against the present plaintiff. But Shaw & Esry have the full benefit of whatever title Miller & Bro., from whom they bought, may have had. If, therefore, Miller & Bro. had a better right than the plaintiff, Shaw & Esry have the benefit of that right, because whatever right Miller & Bro. had they sold to Shaw & Esry.

I do not think it is worth while to discuss the question whether Miller & Bro., as between them and Kuhn & Bro., would have had a right to sell, because that would be more technical than the discussion of
150 the case would warrant me in considering it; and, moreover, I think enough appears to show, as I will presently explain under another head, that between Miller & Bro. and Kuhn & Bro., Miller & Bro. would have had the right to sell.

This brings us to inquire as to the title which Miller & Bro. set up. Miller & Bro. allege that they have, by reason of what occurred between them and Kuhn & Bro., a better title than the plaintiff, and they rest this allegation of title upon the possession by Kuhn & Bro. of the orig-

inal bill of lading and the exhibition of it to them, and transfer of it to them as security for $8,500 advance.

The court is of opinion that if there was no wilful or negligent parting with the bill of lading by the true owners of the cotton (because, recollect, the question is cotton, the bill of lading is the symbol, the property in question is the cotton), we say that if there was no wilful or negligent parting with the symbol of property, that Kuhn & Bro.
151 could transfer no better right than they themselves had. But whatever may be the opinion of the court on the question, whether the Bank of North America or its agents, or, in more correct language, the plaintiffs or their agents, were guilty of any negligence, that question is for you. If you should find that there was, on the part of the plaintiffs or their agents, a negligent—not a wilful parting, as alleged, but a negligent parting with the bill of lading—then the title of Messrs. Miller & Bro. requires consideration under a different light. Then, if there were nothing more in the case, Miller & Bro. would get a better title than the plaintiffs, and hence it becomes necessary to consider a question which I will state thus:

Did Miller & Bro. know any fact or facts from which there was reason to believe that the bill of lading in question was held as a security for an outstanding draft? If they did that, they were not innocent takers. I do not mean that they were not innocent as between them and Kuhn & Bro. I do not mean that there was any moral fraud, but I
152 mean innocent as regards a true owner.

Now this requires us to look at the business of which the bill of lading in question, or the transaction in question, the remittance in question, was a part, if the jury find it is not an isolated transaction. It appears that for several months before November, 1874, Norvell & Co. had been in the habit of making similar shipments to Kuhn & Bro. Kuhn & Bro. had failed to settle with their creditors, and, though in business on their own account, and though nothing was generally known against their character, do not appear to have had either the means or credit to pay cash on delivery, and that explains, probably, the time that the draft in question and other drafts had to run. Twenty days after arrival would enable any capitalist who might advance upon the goods to dispose of them, either Kuhn or the capitalist, so that the money would be forthcoming by the maturity of the draft. The jury will say whether that was not the probable course of things. Of course you
153 understand that much better than I do, but he would have three weeks or thereabouts—twenty days and three days of grace—to return the property after arrival.

The witnesses, without distinctly saying that this was a general transaction of which the remittance in question was a part, without distinctly saying so, that was what the jury may be warranted in inferring was so. For instance, Mr. Miller says, up to a certain time a certain course was taken, and then it was changed and a different course taken; and then he speaks of running the bills of one transaction into another. He says, at the final end of the transaction, after charging this eighty-five hundred dollars and crediting the sale to Shaw & Esrey, that Kuhn & Bro. were still in his debt. A great deal of evidence—all for the jury and not for the court—may warrant the jury, if they so find the fact, in believing that this remittance was not an isolated transaction, but was part of a series of transactions between Norvell & Co. and
154 Kuhn & Bro., in some of which Norvell & Co. and Kuhn & Bro. had an arrangement, carried into effect through a series of transactions of which the remittance in question was a part, and that Mr.

Miller, of the house of Miller & Bro., in some of these transactions (I do not know whether there is any evidence to warrant the jury in finding in all of them, but in some of them) was an intervener to make the advances which Kuhn & Bro. might temporarily require. The jury will recollect the evidence, and they will say whether that is a fair inference from it. If so, the jury may be assisted in passing upon the question, which I will state again, whether Miller & Bro. knew any fact from which they had reason to believe that the bill of lading in question was held as a security for the payment of an outstanding draft.

It appears that in a transaction which was precisely or substantially similar to this, part of the same series of remittances, occurring
155 only less than three weeks before, occurring as recently as the 28th of October, 1874, it is said that the evidence shows, and there certainly is evidence for the jury to find, that Mr. Miller, of the firm of Miller & Bro., actually knew that another bill of lading like that in question had been abstracted from another bank in the city of Philadelphia by Kuhn & Bro., and another bill of lading, not the duplicate, but an old one, substituted for it.

It seems that, as to the transaction to which I am now referring, Mr. Miller, of the firm of Miller & Bro., had made an advance of six thousand dollars; that in consequence of a difficulty which was not fully explained to you, Kuhn wanted to get back the bill of lading on which he had received the six thousand dollars, and got it back on repaying, with a check marked good, the six thousand dollars, and then, obtaining the bill of lading again, brought it back to Mr. Miller and received a new advance of seven thousand dollars. It also appears that Mr.
156 Miller's attention was, in some way, attracted to an advertisement in the newspapers announcing that that bill of lading had been stolen, and warning the public against the circulation; you recollect the substance of it; and it appears that Mr. Miller, in some way, obtained information that the Farmers & Mechanics' Bank was the bank which had something to do with that bill of lading, and that he called at the Farmers & Mechanics' Bank, and that he saw the president of that bank, Mr. Lewis, and although Mr. Miller cannot recollect what passed, Mr. Lewis did not seem to have any doubtful recollection at all. He states very precisely what occurred, and you recollect what it was, that, in substance, he told him this bill of lading had been—I think he used the word stolen—wrongfully abstracted, and there was some reasoning as to what the right of the question was, and Mr. Lewis expressed himself somewhat emphatically on that subject; you will recollect the words, for I do not quote them.

157 It is for you to say how far that and other circumstances, which I will mention, may rationally have contributed to induce in the mind of a reasonable person a distrust of the honesty of Kuhn & Bro., in respect of such transactions as that in question, of which you may find in the evidence in question this is a part.

But there is another circumstance, which accordingly as you may view the facts, and they are entirely for you, may or may not induce you to believe, not merely that Mr. Miller had reason to distrust, but that he actually did distrust Kuhn in reference to the very shipment in question, or remittance in question, because it appears from the testimony of Mr. Miller and other evidence that when he advanced the eighty-five hundred dollars on the bill of lading now in question, he telegraphed, for a purpose which we will consider presently, to a person who represented the carriers, to know if all was right.

158 Now, as regards the carrier, a carrier could know nothing, ex-

cept the fact of whether the cotton was shipped. I do not want to usurp your privilege; it is for you to say whether you so find, but I suggest, for your consideration, that a distrust here was on the question whether this cotton, any cotton, or the cotton represented by the bill of lading, had been shipped at all.

Would Mr. Miller have made that inquiry if he had no distrust of Kuhn & Bro.? Those two circumstances, separately or together, as you may think right, are for your consideration, and upon them, and the whole facts of the case, you will say whether you find that Mr. Miller knew what gave him reason to believe that Kuhn's title was not all right. If you do so find, then it would be of no importance whether the Bank of North America was negligent or not, because they do not lose their title, as between them and Norvell and Kuhn and these men; they would only lose it as regards an innocent, unsuspecting purchaser.

159 If Mr. Miller had reason to believe all was not right, then he took the risk. There was no fraud, but he was not a child under age, and he knew the risk that he ran if he doubted the title. It did not impute any want of integrity in him; in fact, I do not know how it is with you, but I rather think all of us are very much in the habit of running risks of which we know we take the consequences. We take for granted that checks are not forged, and we do it, perhaps, with people we know nothing about, and we may think ourselves very foolish if we get into difficulty, but it does not affect our moral standing; and, I say, I do not see anything in this case to raise a question affecting Mr. Miller morally; but the question is whether he has not taken a risk on himself of which he ought to take the consequences.

This outline of the case covers the points of it which we think material.

160 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set.:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of the Merchants' National Bank of St. Louis v. Shaw et al., No. 79, October session, 1874, on file, and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this ninth day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of these United States the 102nd.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) No. 157. Hugh Shaw & David Reese Esrey, plaintiffs in error, vs. The Merchants' National Bank of St. Louis. E. Pennsylvania C. C. U. S. Filed 18th July, 1877.

No. 157.

Supreme Court of the United States.

HUGH SHAW AND DAVID REESE ESREY,

PLAINTIFFS IN ERROR,

vs.

THE MERCHANTS' NATIONAL BANK OF ST. LOUIS,

DEFENDANT IN ERROR.

PHILADELPHIA BAR ASSOCIATION

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

PAPER-BOOK FOR PLAINTIFFS IN ERROR.

WILLIAM HENRY LEX,
JAMES E. GOWEN,
For Plaintiffs in Error.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

Hugh Shaw and David Reese Esrey, Plaintiffs in Error and Defendants below,

vs.

The Merchants' National Bank of St. Louis, Defendant in Error and Plaintiff below.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

ABSTRACT OF THE CASE.

This was an action of replevin brought by the Merchants' National Bank of St. Louis, described in the writ as "a citizen of the State of Missouri," and in the declaration as "a body corporate, incorporated under the laws of the United States, and a citizen of the State of Missouri," against Messrs. Shaw & Esrey, citizens of the State of Pennsylvania, for the recovery of one hundred and forty-three bales of cotton.

The marshal made return to the writ that he had replevied one hundred and one bales, part of the property mentioned in the writ, and had summoned the defendants, that they had entered a property bond, that the property replevied had been delivered to them and that the residue of the property named in the writ had been eloigned.

The declaration contained two counts. The first alleged that the defendants took and still detained one hundred and one bales of cotton belonging to the plaintiff; the second, that they took and still detained one hundred and forty-three bales of cotton belonging to the plaintiff.

The pleas originally filed were "*non cepit* and property," on which issue was joined. Afterwards, by leave of the court, the defendants pleaded (1) that they did not take or detain the goods in the declaration mentioned; and (2) that the property in the goods was in them, without this, that the property in the said goods was in the plaintiff.

The second additional plea concluded with a verification, and was replied to by an averment that the property in the said goods was not in the defendants in manner and form as alleged.

The first trial resulted in a verdict for the plaintiff, which was set aside by the court. A second trial ended in another verdict for the plaintiff, on which judgment was entered.

On the second trial, and indeed in both, but the second only is material now, the plaintiffs claimed that they had acquired title to the cotton in controversy by the endorsement to them of a bill of lading for this and other cotton as collateral security, not for the acceptance only, but for the payment of a time-draft, drawn by the consignors, Norvell & Co., of St. Louis, on the consignees, Kuhn & Brother, of Philadelphia, which they, the plaintiffs, had discounted for Norvell & Co.

This very bill of lading had however come subsequently into the possession of the consignees (Kuhn & Brother) without their having paid the draft, they had assigned it to a firm of Miller & Brother, of Philadelphia, in consideration of an advance made upon the cotton, and Miller & Brother, having obtained possession of the cotton on the surrender of the bill of lading, had sold it (the cotton) to the defendants.

The circumstances attending the transfer of the bill of lading from the bank (plaintiff), to Kuhn & Brother (consignees of the cotton and drawees in the draft), and from Kuhn & Brother to Miller & Brother (the defendants' vendors), appear to have been briefly these :--

The bill of lading (a copy of which will be found at page 23 of the Record) was one of a set of two issued by the carriers at St. Louis. Although not marked *original*, it was referred to on the trial as *the original*, because the other was marked "duplicate." (See page 24 of Record.) Each bill was drawn to the order of Norvell & Co., the consignors, and was by them endorsed in blank. The duplicate, however, was marked "*not negotiable*."

Kuhn & Brother were the ultimate consignees of the cotton for which the bills had been issued; and each bill contained the words "Notify M. Kuhn & Brother." The original was attached to a draft for $11,947.43, drawn by Norvell & Co., payable twenty days after sight, to the order of themselves, on Kuhn & Brother, Philadelphia, and which was expressed to be for "value received, one hundred and seventy bales cotton, bill of lading attached." Norvell & Co. endorsed this draft and the attached bill of lading in blank, delivered them to the bank (plaintiff), and received from the bank the proceeds of the discount of the draft. The evidence adduced by the plaintiffs was to the effect that the bill of lading was to be held as security for the payment, and not merely for the acceptance of the draft. The other or duplicate bill of lading was mailed to Kuhn & Brother by Norvell & Co.; and the same mail, no doubt, carried the draft with the original bill of lading attached, to the Bank of North America, in Philadelphia, for collection on behalf of the plaintiff.

Unfortunately, the bank (plaintiff) had not taken the precaution (taken in the case of the draft) of endorsing the bill to the order of its correspondent in Philadelphia, and thus the mere possession of the bill of lading would invest the holder with an apparent title to it.

On the 14th of November, 1874, the original bill of lading was in the possession of the Bank of North

America, and the duplicate bill was in the possession of Kuhn & Brother; and on the same day one of the members of that firm, without the consent or knowledge of the bank, got possession of the original by substituting the duplicate for the original, while he had temporary possession of the latter for the purpose of accepting the draft attached to it.

There was no direct evidence of the mode in which this substitution had been made, but there was evidence that a runner of the Bank of North America had taken the original bill with the draft to the counting-house of Kuhn & Brother, that the draft had been there accepted and returned to the runner, with *a bill of lading* attached, which he supposed to be *the original*, but which, some weeks afterwards, and after the protest of the draft for non-payment, was discovered to be the *duplicate*.

On the same day when this transaction occurred, November 14th, 1874, Kuhn & Brother endorsed the original bill of lading to Miller & Brother, a commission firm of long standing in the city of Philadelphia, and received thereon an advance of $8500. The advance was made on samples of the cotton; and within a few days afterwards, the cotton, or rather that portion of it for which this suit was brought, was sold by sample with the approval of Kuhn & Brother to the defendants, who were manufacturers at Chester, Pennsylvania, through the agency of a broker. The bill of lading had been deposited on the 14th of November, 1874, with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, and on its arrival the cotton was delivered to the defendants.

The cotton began to arrive on the 21st of November, and by the 28th of the same month it had all reached Philadelphia. The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December,

1874, by Mr. Yeatman, president of the Bank of St. Louis (plaintiff), who had gone to Philadelphia in consequence of the failure of Kuhn & Brother, and the consequent protest of the draft.

The railroad company had no notice of any adverse claim to the cotton, neither the plaintiffs nor their agents having taken the precaution of informing the company that they held a bill of lading.

From this brief statement of the case it will be seen that the controversy mainly turned upon the negotiability of the original bill of lading.

The law of Missouri, where the bill of lading was delivered to the consignors, and where it was transferred to the plaintiffs, is as follows :—

"All receipts issued or given by any warehouseman, or other person or firm, and all bills of lading, transportation receipts, and contracts of affreightment issued or given by any person, boat, railroad, or transportation or transfer company, for goods, wares, merchandise, grain, flour, or other produce, shall be and are hereby made negotiable by written endorsement thereon and delivery, in the same manner as bills of exchange and promissory notes, and no printed or written conditions, clauses, or provisions inserted in or attached to any such receipts, bills of lading, or contracts, shall in any way limit the negotiability, or affect any negotiations thereof, nor in any manner impair the rights and duties of the parties thereto, or persons interested therein; and every such conditions, clauses, or provisions purporting to limit or affect the rights, duties, or liabilities created or declared in this act shall be void and of no force or effect."

Wagner's Missouri Statutes, page 221, section 6.

In Pennsylvania, where the bill was endorsed to Miller & Brother, and where the cotton was delivered on the

surrender of the bill, the statute law on the subject of bills of lading is as follows:—

"AN ACT RELATING TO GOODS, WARES, AND MERCHANDISE, IN STORE AND TRANSIT, AND TO MAKE RECEIPTS AND BILLS OF LADING THEREFOR NEGOTIABLE.

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That warehouse receipts, given for any goods, wares, merchandise, grain, flour, produce, petroleum, or other commodity stored or deposited with any warehouseman, wharfinger, or other person in this State, or bills of lading, or receipts for the same, when in transit by cars or vessels to any such warehouseman, wharfinger, or other person, shall be negotiable, and may be transferred by endorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created shall be delivered by said warehouseman, wharfinger, or other person, except on the surrender and the cancellation of said original receipt or bill of lading, or in case of partial sale or release of the said merchandise, by the written assent of the holder of said receipt or bill of lading endorsed thereon: *Provided,* That all warehouse receipts or bills of lading which shall have the words 'not negotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this act."

The second section of the act forbids the issuing of any receipt or voucher by any warehouseman or other person, unless the goods have been actually received.

The third section provides that no second or duplicate receipt shall be issued whilst any former receipt is outstanding, unless the word "duplicate" is written across the face of the same.

The fourth section forbids the sale, shipment, or transfer, by any warehouseman or other person, of any goods for which he has given a receipt, without the return of such receipt.

The fifth section provides for the infliction of penalties for violation of any of the provisions of the act.

The sixth section provides that so much of the act as forbids delivery of property except on surrender of original receipt or bill of lading, &c., shall not apply to property replevied or removed by operation of law.

The seventh and last section extends the provisions of the act to grain stored in elevators, &c., &c.

This act was approved September 24th, 1866, and may be found at page 1363 of Pamphlet Laws of 1867.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill.

This view of the case was not adopted by the court below.

The learned judge (Cadwalader), by whom the charge to the jury was delivered, although speaking of the bill of lading as "negotiable," evidently understood that term as conveying an entirely different meaning from that understood when it is applied to a promissory note or bill of exchange. At least he so construed the law as established by the Pennsylvania statute, which in this respect he thought was distinguishable from the statutes of Missouri and some other States; and it is to be inferred from the charge that he thought the case was governed by the law of Pennsylvania.

The language of the charge does not enable us to define with precision the extent or peculiarities of the "negotiability" imparted to bills of lading by the Pennsylvania statute as understood by the court.

Indeed, it would rather seem that the term was used by the court in an abnormal sense. But be this as it may, we find that the *quasi* or exceptional negotiability of the bill of lading, in the present case, was held insufficient to validate the transfer made by Kuhn & Brother to Miller & Brother, unless the original holders (the plaintiffs) had parted with the possession of the bill willfully or negligently, and unless Miller & Brother knew of no fact from which they had reason to believe that the bill was (had been?) held as security for the payment of an outstanding draft.

The jury by their verdict found that there was no negligence on the part of the plaintiffs, or their agents, in parting with possession of the bill of lading, and that Miller & Brother did know a fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The improbability of Messrs. Miller & Brother having actually suspected, much less known, that the bill of lading on which they advanced so large a sum was invalid, was so great that the court did not think fit to

submit that question to the jury. The question actually submitted, and the finding of the jury, neither expressed nor implied any charge of actual connivance on the part of Miller & Brother in the fraud practised upon them by Kuhn. In fact, the learned judge by whom the charge was delivered took some pains to disavow such an imputation. "There was no fraud," he said; and again, "I say I do not see anything in this case to raise a question affecting Mr. Miller morally." (See page 46 of Record.) Mr. Miller's intelligence and not his honesty was questioned; and if this judgment is sustained he will be punished, not for guilty knowledge, but for innocent ignorance.

The plaintiffs in error contend that the issue thus presented was irrelevant, and would have been so under any circumstances. They also contend that there was no evidence to warrant the submission to the jury of Miller & Brother's knowledge of "any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft."

It is not proposed to review all the evidence in the case for the purpose of sustaining this latter proposition. The charge of the learned judge refers to the circumstances which led him to present the case in the form complained of, and it is fair to assume that these only need be considered. If there were others, the defendants will have the opportunity of calling the attention of the court to them.

It appeared, from evidence obtained from Mr. Andrew H. Miller on cross-examination, and against the objection of the counsel of the plaintiffs in error (see page 26 of Record) that on the 27th of October, 1874, less than three weeks before the transfer of the bill of lading which gave rise to the present controversy, there had been a difficulty about Kuhn & Brother's title to a bill

of lading, on which Miller & Brother had made an advance, that the advance had been returned and the bill of lading delivered back to Kuhn, and that after Kuhn & Brother had acquired a good title to the bill of lading, they had again obtained an advance from Miller & Brother.

The circumstances of this transaction were as follows:

One of the Kuhns brought to Mr. Andrew H. Miller, on the 27th of October, 1874, a bill of lading for a hundred and forty-one bales of cotton, and asked an advance of $7500 or $8000 on it. Mr. Miller gave him $6000, took the bill of lading, sent it to the railroad depot, where the cotton was expected to arrive, and on the 28th got a receipt for the bill. On the same day (October 28th, 1874), Mr. Miller received notice from the railroad company that the cotton had arrived. He went to the depot, but was there told that the bill of lading had been "stopped." On his return he had an interview with Kuhn, who said there was trouble, and he wanted the bill of lading back. It was given back to him, and the money was repaid by Kuhn, who, either at that time or at a later hour in the day, asked Mr. Miller to go to the Farmers' and Mechanics' Bank of Philadelphia, and satisfy himself that he would be justified in making an advance upon the bill of lading. It does not clearly appear from Mr. Miller's evidence why he was referred to this bank; but between the time of his sending back the bill of lading to Kuhn, and before his visit to the bank, his attention had been called to an advertisement in a newspaper, stating that the bill of lading had been stolen and cautioning all persons against purchasing it, or making advances on it, and he understood that the advertisement had come from the Farmers' and Mechanics' Bank. He went to the bank, and having learned that "Kuhn had paid the draft," and that the bank had no claim upon

the bill of lading, he advanced $8000 to Kuhn & Brother, got the cotton, sold it, and accounted for the proceeds.

The object of this testimony was said to be to show that Mr. Miller knew that Kuhn & Brother, or one of them, had *stolen* the bill of lading. Mr. Miller emphatically denied that he had "any idea" that Kuhn had stolen it. For some reason, not altogether intelligible, the counsel for the defendants in error endeavored to get Mr. Miller to say that Kuhn had claimed the right of detaching the bill of lading when he had accepted the draft to which it was attached, and they introduced his (Miller's) evidence on the former trial to prove that he (Miller) had said that such was his impression, or recollection. At all events he did not remember either that Kuhn had claimed such a right, or that he had so testified; and it may be suggested that his refusal to admit that such a plausible explanation had been given, was rather creditable to his candor.

Mr. Lewis, the president of the Farmers' and Mechanics' Bank, was called by the defendants in error to give his recollection of the conversation at the bank between Mr. Miller and himself. This witness said distinctly that he had not charged Kuhn with stealing the bill of lading. He did say that he had told Mr. Miller that the bill of lading had been received by the bank attached to a draft, that the draft had been sent out for acceptance, and that the next day they had discovered that another and an old bill of lading for fifty bales of cotton had been substituted in its place, that they had taken immediate measures to stop the original bill, and that they had received it from Kuhn & Brother that very morning. This statement was apparently inconsistent with Mr. Lewis' admission that "We (they) could not tell whether the bill of lading had been detached in St. Louis or here (Philadelphia);" and as Mr. Lewis (who is a gentleman of the highest respectability) could not have told Mr. Miller what

he himself did not know, the simple explanation of the matter is that Mr. Lewis' memory was somewhat at fault in leading him to suppose that he had told Mr. Miller that the bill of lading had been detached in Philadelphia.

The other circumstance to which the charge of the learned judge specially referred, was that some time after the sum of $8500 had been advanced on the bill of lading now in controversy, but on the same day, he (Mr. Miller) at the suggestion of his son, telegraphed to the Despatch Line at St. Louis, which had issued the bill, to know whether it was correct. Doing this was considered evidence of Mr. Miller's knowing "what gave him reason to believe that Kuhn's title was not all right," although he had then acquired title to the bill. Upon the same principle a tradesman who had changed a bank note would, by casually examining a counterfeit detector, afterwards subject himself to the imputation of knowing that the note was bad when he gave good money for it.

ASSIGNMENTS OF ERROR.

I. The court below erred in overruling the objection made by the defendants below, which is contained in the following extract from the bill of exceptions:—

"The plaintiffs' counsel having pressed the question, 'State particularly your whole connection with and knowledge of a bill of lading brought to you by Kuhn & Brother, October 27th, 1874, for one hundred and forty-one bales of cotton;' and the witness having stated that he remembered this transaction, the question was objected to by the defendants' counsel. Whereupon the counsel of the plaintiff stated that this was one of the series of shipments specified in the exhibit annexed to the commission to St. Louis (*i. e.* an exhibit of the various lots of cotton which had been consigned from St. Louis by Norvell & Co. to Kuhn & Brother during

the year 1874). The defendants' counsel objected to the question as irrelevant, not proper cross-examination, and because there is nothing to indicate that the witness' knowledge of a transaction said to have occurred October 27th, 1874, can affect him with a guilty knowledge of the alleged illegal transfer of the bill of lading, which was not issued until November 11th, 1874.

"The learned judges overruled the objection—whereupon the counsel for the defendants excepted, and the court sealed this bill of exceptions."

II. The court below erred in overruling the objection and admitting the evidence contained in the following extract from the bill of exceptions:—

"The plaintiffs, in rebuttal of defendants' case, then called John H. Watt—sworn. Plaintiffs' counsel proposed to prove that the bill of lading in question was received by the plaintiffs' agent, the Bank of North America, and how it got out of their possession. To which evidence defendants' counsel objected as not being evidence in rebuttal. The court overruled the objection and admitted the offer—whereupon counsel for the defendants excepted, and the learned court sealed this bill of exceptions."

III. The court below erred in overruling the objection and admitting the evidence contained in the following extract from the bill of exceptions:—

"Edwin M. Lewis, sworn. Plaintiffs' counsel proposed to prove by this witness the whole of the conversation between himself and Mr. Miller, October 28th, 1874, in relation to which Mr. Miller was examined. Objected to by defendants' counsel, because the evidence offered is not in rebuttal of the defendants' evidence, but of the plaintiffs'; and because it is incompetent for the plaintiff thus to contradict the evidence of Mr. Miller adduced by them. The court admitted the evidence, and on the

counsel for the defendants excepting, sealed this bill of exceptions."

IV. The court below erred in answering the defendants' first point, viz. :—

First Point.—" That the plaintiffs' title to the cotton in controversy was acquired by the transfer to them of the bill of lading under which it was shipped; that the possession of this bill of lading carried with it the title to the cotton only during the transit of the cotton to its destination and for such a period of time thereafter as might reasonably be required to enable the plaintiffs to take charge of it on its arrival, or to notify the carriers that they (the plaintiffs) held the bill of lading; and that if the jury believe from the evidence that neither the plaintiffs nor their agents made any effort to secure the cotton, or inform the carriers that the bill of lading had been transferred to them within a reasonable time after the date when, in the ordinary course of business, the cotton was due here, the verdict must be for the defendants."

as follows :—" We decline to give you that instruction."

V. The court below erred in answering the defendants' second point, viz. :—

Second Point.—" That there is no evidence in the case that the plaintiffs made any demand for the cotton, or even informed the carriers that the bill of lading had been transferred to them, until after the draft was protested; and that as against the defendants, who were purchasers for value and in good faith (if the testimony is to be believed), this neglect of the plaintiffs to assert their title

precludes them from recovering, and the verdict must be for the defendants."

as follows:—"The court can not give that instruction as expressed."

VI. The court below erred in answering the defendants' third point, viz.:—

Third Point.—"That to entitle the plaintiffs to recover, the jury must be satisfied not only that the plaintiffs were at one time the rightful holders of the bill of lading, but that they were unlawfully deprived of it, and that Miller & Brother acquired it either without consideration or with notice of the want of title of the person by whom it was transferred to them; and that there is no evidence in the case which would warrant such a conclusion."

as follows:—"We can not give that instruction."

VII. The court below erred in answering the defendants' fourth point, viz.:—

Fourth Point.—"That if the jury find from the evidence that the original bill of lading for the cotton in controversy was transferred to Miller & Brother by Kuhn & Brother while the cotton was in transit, for a valuable consideration, and without notice to Miller & Brother of any defect in Kuhn & Brother's title to the bill, their verdict must be for defendants."

as follows:—"If the fact were so, and there was nothing else in the case, the verdict should be for the defendants."

VIII. The court below erred in answering the defendants' fifth point, viz.:—

Fifth Point.—"That there is no evidence in the case which would warrant the jury in finding that Miller & Brother had any knowledge that the original bill of lading was not the property of Kuhn & Brother when the latter obtained an advance upon it from Miller & Brother."

as follows:—"We decline to give that instruction in the form in which it is expressed."

IX. The court below erred in instructing the jury as follows:—

"It is important to inquire whether the Bank of North America lost or parted possession with the bill of lading negligently or willfully; for if that were the case, a wrongdoer in possession of it might impart to another a better title than he himself had. But if neither the plaintiffs nor the Bank of North America negligently or willfully parted with the bill of lading, Kuhn & Brother could not vest in Miller & Brother a better title than they, Kuhn & Brother, had."

X. The court below erred in instructing the jury as follows:—

"If you find that possession of the bill of lading was parted with negligently, then the question will be whether Miller & Brother knew any fact from which they had reason to believe that the bill in question was held as security for the payment of an outstanding draft."

XI. The court below erred in instructing the jury as follows:—

"It was not necessary that the jury should be convinced that Miller & Brother had any fraudulent inten-

tion in the matter, but that it was a question as to whether they had not reason to believe that Kuhn & Brother's title was defective."

(MEMORANDUM.—The above assignments, as far as they refer to alleged errors in the judge's charge, are predicated of the charge as legitimately set forth in the bill of exceptions (see pages 39 and 40 of Record). The court, however, "at the request of the plaintiffs' counsel and against the objection of the defendants' counsel, directed that the entire charge of the court should be set out in the bill, whereupon the same was done, *pro ut* the entire charge, hereto annexed as part of and incorporated with the bill of exceptions." (Page 40.)

It is respectfully submitted that the course followed in this respect by the court was inconsistent with correct practice. A rule of this court, adopted in 1870, says that "when the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis* in the specification." "The charge of the court" here mentioned, must mean the charge as set forth in the exceptions presented and allowed at the trial, and not the charge as subsequently written out in full and filed. It can not be expected that the two will be *ipsissimis verbis*.

The difference in the present case is immaterial; but at the risk of being thought over cautious, some of the preceding assignments of error are reproduced in the exact words of the charge as annexed to the bill of exceptions).

XII. The court below erred in instructing the jury as follows:—

"As the bill of lading was negotiable, it becomes very important to inquire whether the possession of it was

willfully or negligently parted with by the Bank of North America as agent of the plaintiffs, the Merchants' Bank of St. Louis. * * * * If the plaintiff, the Merchants' Bank of St. Louis, or their agents, neither willfully nor negligently parted with the bill of lading, but it was surreptitiously abstracted, the court is of opinion that Kuhn & Brother could not transfer to them (Miller & Brother) a better title than they themselves had."

XIII. The court below erred in instructing the jury as follows:—

"If you should find that there was, on the part of the plaintiffs or their agents, a negligent—not a willful—parting as alleged, but a negligent parting with the bill of lading—then the title of Messrs. Miller & Brother requires consideration under a different light. Then, if there was nothing more in the case, Miller & Brother would get a better title than the plaintiffs, and hence it becomes necessary to consider a question which I will state thus:—

"Did Miller & Brother know any fact or facts from which there was reason to believe that the bill of lading in question was held as a security for an outstanding draft. If they did that, they were not innocent takers. I do not mean that they were not innocent as between them and Kuhn & Brother; I do not mean that there was any moral fraud; but I mean innocent as regards a true owner."

XIV. The court below erred in entering judgment that the plaintiffs do recover against the defendants, "as well the said sum of $\$7015\frac{97}{100}$, the amount of the verdict aforesaid, as also the sum of for their costs and charges, &c., upon a verdict which found that the value of the goods *eloigned* was $\$7015\frac{97}{100}$."

POINTS AND AUTHORITIES FOR THE PLAINTIFFS IN ERROR.

1. The original bill of lading under which the cotton in controversy was shipped was a negotiable instrument, and its endorsement, while the cotton was in transit, to Miller & Brother, for a valuable consideration, and without notice of any defect in the title of the endorsers, invested them (Miller & Brother) with a valid title to the goods.

The question thus presented is important, and one about which there should be no doubt.

A variance in the statutory enactments of the different States on a subject of such common interest would be unfortunate, but as it cannot be assumed, *a priori*, that the commercial laws of all the States have been dictated by the same policy, we must first inquire by what State law the question is to be determined.

The bill of lading was issued in Missouri, and was there first negotiated. It was transferred to Miller & Brother in Pennsylvania, and it is impossible to say where the goods actually were at the date of this transfer.

(*a.*) The plaintiffs in error contend that the law of Missouri should govern.

When the Merchants' National Bank of St. Louis took the bill of lading, Missouri was the place in which the contract was made,—the place in which the property was actually situated,—and it was the domicil of all the contracting parties. There can be no doubt, therefore, that the legal effect of the bill was, for the time being at least, determinable by the law of Missouri. If that law made the bill a negotiable instrument, it would seem anomalous that its character should vary with the varying law of each State through or into which the goods might pass.

In Scudder *vs.* Union National Bank, 1 Otto, 406, a

bill of exchange drawn by a firm in Chicago upon a firm doing business in St. Louis was verbally accepted by a member of the latter firm in Chicago, and was discounted by a bank in that city. The bill was not paid when it fell due, and suit was brought by the bank against the acceptors (*i. e.*, the firm in St. Louis). The latter set up as a defence to the suit that the acceptance being by parol was not binding, since the law of Missouri, where the acceptors resided, and where the bill was payable, required the acceptance to be in writing. This court held, however, that the law of Illinois, where the contract was made, governed, and, since by that law a parol acceptance was binding, gave judgment for the bank. Justice Hunt, in delivering the opinion of the court, says: "Matters bearing upon the execution, the interpretation, and validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

Certainly the question of the negotiability or non-negotiability of a contract should be determined by the same law which would determine whether that contract was a real or personal obligation, conditional or absolute, or principal or accessary, &c., which are dependent for their determination upon the law of the place where the contract was made. Story on Conflict of Laws, section 263.

The authorities establish the doctrine that when a contract is made in one country for the shipment or transportation of goods or passengers to another country, the law of the place where the contract is made governs in determining the interpretation of the contract and the rights of the parties thereunder.

Thus in The Peninsular and Oriental Steamship Company *vs.* Shand, 3 Moore's Privy Council Reports (N. S.), 272, Shand, being in England, purchased a ticket from the steamship company for the passage from Southampton, England, to Mauritius. There was endorsed upon the ticket a notice that the company did not hold itself liable for loss of passenger's baggage—a condition valid by the law of England but invalid by that of Mauritius. Shand, having lost part of his baggage, sued the company in the Supreme Court in Mauritius, and that court held that the contract was governed by French law in force at Mauritius, upon the ground that Mauritius was the place of performance of the contract, and that the law of the place of performance determined the validity and interpretation of the contract. Judgment was accordingly given against the company, which on appeal to the Privy Council was reversed, upon the ground that the contract should have been interpreted by the law of England, the place where it was made.

In a note to this case there is set out a judgment to the same effect of the Cour de Cassation in France.

In McDaniels *vs.* Chicago and Northwestern Railway Company, 24 Iowa, 412, plaintiff sued to recover damages for injury suffered by his cattle while being transported on defendants' road. The contract was made in Iowa, and called for delivery of the cattle in Illinois. A restriction of defendants' liability was endorsed on the bill of lading, which restriction was valid by the law of Illinois, but invalid by that of Iowa. The court held the restriction invalid upon the ground that the contract was an entire one, and was made and to be partly performed in Iowa, and must be governed by the law of Iowa as to its validity and interpretation.

In The First National Bank of Toledo *vs.* Shaw, 61 New York, 283, a bill of lading had been issued by a carrier company at Toledo, Ohio, for wheat received at

that place, and to be transported to and delivered at Buffalo, New York. Subsequently, by reason of a contest as to the ownership of the grain, it became necessary to determine the meaning and effect of certain words in the bill of lading, and testimony was introduced by one of the parties to explain their commercial meaning at Toledo. This was objected to by the other party upon the ground that the contract was to be interpreted not by the law of Ohio, but by that of New York, which they contended was the place of performance. The court held, however, that the bill of lading must be interpreted by the law of Ohio. They say: "In the more general case, where a contract is made in one country and to be performed in another, it is not always easy to determine, according to the authorities, whether the interpretation of words is to be governed by the law of the place where the contract is made, or by that where it is to be performed. The general principle is, that the law of the place where the contract is made is to govern, unless it is positively to be performed elsewhere. The fact that acts are to be done abroad under a contract does not necessarily make it a contract to be performed there in a legal sense. * * * The true inquiry is, what was the intent of the parties? It would seem that in a case like the present, where the contract was made in Ohio by Toledo parties, the money being advanced there, and the security there, they had in view in employing words, their own usages, even though the goods were to be sent to another State, and ultimately sold there if the advances were not repaid." The syllabus of this case is as follows: "A bill of lading executed in Ohio of merchandise, there shipped to be transported to a place in this State, which bill is delivered in pursuance of a contract made in and by residents of a State, to one there making advances upon the faith thereof, and to secure drafts drawn for such advances on parties in

this State, is an Ohio contract, and is to be construed by and under the laws and commercial usages of that State." This is a correct statement of the facts in that case attending the issuing of the bill of lading, and the facts in the present case are precisely similar. A case identical with the present one, so far as the determination of the question as to what law is to govern in the interpretation of the bill of lading is concerned, is Henry *vs.* Philadelphia Warehouse Company, 81 Pennsylvania State Reports, 76. There the Supreme Court of Pennsylvania held that the negotiability of a bill of lading which had been issued in New Orleans and there pledged, depended on the law of Louisiana, although the goods were deliverable at a Northern port.

"The weight of authority seems to be that the law applicable to a contract for freight or passage is that of the place where the contract was made."

Wharton on Conflict of Laws, section 471.

If the law of Missouri governs in the present case, then undoubtedly the bill of lading is negotiable, since the statute of Missouri, set out above, enacts that warehouse receipts and bills of lading shall be negotiable "in the same manner as bills of exchange and promissory notes." In the case of Henry *vs.* Warehouse Company (*supra*), the Supreme Court of Pennsylvania, in construing the statute of Louisiana, which contained a like provision, held that it made bills of lading negotiable instruments, and indeed the learned judge in the court below impliedly conceded that if the statute of Missouri were applicable the bill of lading was negotiable and the title of Miller & Brother was a valid one.

The fact that the bill was endorsed to Miller & Brother in Pennsylvania, does not exclude the operation of the Missouri statute in determining the effect of the transfer.

The question is not as to the relations created between Miller & Brother and their endorsers by the new contract

of endorsement, but as to the former's succession to the title to the bill of lading.

In speaking of the effect of the endorsement of a promissory note, Judge Story in his work on Bills of Exchange says :—

"The endorsement does not create a new contract between the maker and the endorsee in the place of the endorsement. The rights of the endorsee spring from and under the original contract, and are a component part of it. The original contract promises to pay the endorsee as much as the payee, and from the first of its existence. The endorsement is but a substitution of the endorsee for the payee, and it transfers over the old liability and creates no new liability of the maker. If the endorsement created a new contract in the place where it was made between the maker and the endorsee, then the validity, obligation, and interpretation of the contract would be governed by the law of the place of the endorsement, and not by that of the place where the note was originally made. It would not then amount to a transfer of the old contract but to the creation of a new one, which from a conflict of laws, not unusual in different States, would, or might, involve obligations and duties wholly different from and even incompatible with the original contract. Nay, the maker might, upon the same instrument, incur the most opposite responsibilities to different holders according to the law of the different places where the endorsement might be made." Story on Bills, section 167.

In Ory *vs.* Winter, 4 Martin's Rep. (N. S.), 277 (La.), the case was as follows: A promissory note, made in Mississippi, payable generally, was endorsed in Louisiana to the plaintiff, a citizen of that State. A statute of Mississippi provided that the maker of a note might set up any equitable defence against a *bona fide* endorsee which he could have offered against the payee.

The plaintiff contended that as the note was endorsed

to him, a citizen of Louisiana, in Louisiana, the rights of the parties should be governed by the laws of that State. The Supreme Court of Louisiana held, however, that the law of Mississippi governed. They said, "That the validity of the contract must be ascertained in relation to the laws of the country where it is made, is a rule as well known and of as frequent application in this court as any other we act under. We see nothing in the circumstances of the rights of one of the parties being transferred to the citizen of another State, which can take the case out of the general principle. The argument which attempts to do so, takes for granted the note was negotiable in our understanding of the term, though the very object of the statute was to take from it that character. This is not the case of a citizen of one state claiming rights in opposition to those set up by a third party under a contract made in pursuance of the laws of another country. It is a demand made under an agreement entered into in a foreign State and consequently the party claiming rights under it must take it with all the limitations to which it was subject in the place where it was made, and that although he be one of our citizens."

In the case of Slacum *vs.* Pomery, 6 Cranch, 221, it was assumed by the Supreme Court of the United States, that in the case of a negotiable bill of exchange the drawer's responsibility was governed by the law of the place where the bill was drawn, notwithstanding an endorsement in another country. The above cases are cited with approbation in Story on Bills, sections 169, 170, and 171.

In De la Chaumette *vs.* Bank of England, 2 Barnewall & Adolphus, 385, it was held that a promissory note payable to the bearer made in England, where it was negotiable by statute, is transferable by delivery in a foreign country.

In Trimbey *vs.* Vignier, 1 Bingham's New Cases, 151, it was held by the Court of Common Pleas, that the holder and endorsee of a promissory note made in France, and there endorsed in blank, could not sue upon it in England, since by the law of France an endorsement in blank did not transfer the property.

In Lebel *vs.* Tucker, L. R., 3 Q. B., 77, the Court of Queen's Bench held that an action could be maintained in England upon a bill of exchange drawn, accepted, and payable in England by an endorsee against the acceptor, though the endorser and endorsee were at the time of the endorsement domiciled in France, where the endorsement was made, and though no action could be maintained in France, on account of the invalidity of the endorsement. This question received an exhaustive and thorough examination in the case of Robertson *vs.* Burdekin, decided in the Court of Session of Scotland in 1843. Reported 1 Ross' Leading Cases, page 559. There a promissory note was made in Scotland, payable generally. A payee was mentioned, but without the addition of the words "or bearer," or "to order." This instrument was negotiable by the law of Scotland, but was not so by the law of England, for want of words of negotiability; and it was admitted that if it had been an English document it would not have been transferable by endorsement. The court held that the contract must be governed by the law of Scotland, and that the endorsement in England transferred the note. Lord Justice Clerk Hope says: "The endorsing the note in England does not make a new contract, but is merely the carrying into operation the original contract made in Scotland, which sanctioned such endorsement, True, the contract must be transferred, and hence the endorsement must be such as is required by the law of England to transfer an endorsable document; and that transfer is

sometimes called a contract, and is one, so far as the object of transference is concerned. But still it is the transfer of the original contract, which original contract is a Scotch contract, *suâ naturâ* transferable. The endorsement does not affect the original contract, much less make a new one, which has no reference to the contract in the promissory note. As the original contract was then the subject of transference, I am of opinion that the acceptor cannot restrain his obligation under that contract by the plea that the note was carried to England, and that the note thereby lost that important character which he made part of his acceptance. Take the converse case, that the document was not transferable by the law of Scotland, or that transference had been excluded by the terms of the document itself before acceptance. Can it be reasonably held that the character of the document would be altered, and the obligation of the debtor so seriously affected and enlarged, because the document had been taken to a country where in general promissory notes are transferable? The principle here is the same, that the obligation of the debtor can not be restrained and limited in the converse case to the above, and that he can not avoid payment by denying the title acquired by endorsement to his note, which, by the law of Scotland and as the effect of his acceptance, was an endorsable note.

Lord Medwyn: "Although it might be consistent with principle to allow the law of the place where the endorsement was made, to regulate its effect between endorser and endorsee, as between the endorsee and the maker no new contract is created, the contract between them remaining the same original contract, regulated by the *lex loci contractus;* the endorsee is merely substituted in the place of the original payee, and the maker remains under the same liability he contracted at the time

he made the note, which was to pay the payee or the holder by endorsement."

Lord Moncrieff: "There is no case in which it has been held that a Scotch bill payable in Scotland, though not bearing to order, can not be effectually endorsed by the *nominatim* payee in England. The contrary seems rather to be implied in all the cases. In point of principle, it should seem that the law of the place where the note is made, and where it is also payable, must regulate the question as to its negotiability (at least as to the granter or acceptor's liability), wherever the act of negotiation takes place." This case is cited in Wharton on Conflict of Laws, and the law is declared to be in accordance with its doctrine. Sections 452, 453, and 454 of Wharton on Conflict of Laws.

(*b.*) The plaintiffs in error contend that even if the effect of the bill of lading in the hands of Miller & Brother were determinable by the law of Pennsylvania, it would be a negotiable instrument by the law of that State. The statute of Pennsylvania, already cited, expressly enacts that "warehouse receipts * * or bills of lading * * shall be negotiable." The mere recital of this provision would seem sufficient to determine the point in favor of the contention of the plaintiffs in error, unless there is some other inconsistent provision. It is a familiar principle of law that when technical words occur in a statute, they are to be taken in a technical sense, unless it appears that they were intended to be applied differently from their ordinary or legal acceptation. Thus in United States *vs.* Jones, 3 Wash. C. C. Rep., 209, a question having arisen as to the meaning of the word *robbery* as used in a statute, Mr. Justice Washington said: "If a statute of the United States uses a technical term which is known, and its meaning fully ascertained by the common or civil law, from one or

other of which it is obviously borrowed, no doubt can exist that it is necessary to refer to the source whence it is taken for its precise meaning."

In United States *vs.* Wilson & Peters, Baldwin's Rep., 78, Mr. Justice Baldwin, in considering the meaning of certain words in an act of Congress, said: "There is no rule of law better settled than this: that where a word or a set of words has received a fixed and determined meaning, and is afterwards used in a law, it is with a reference to such meaning, as much so as if that meaning had been superadded as a definition. It is on this principle that the word *rob* and *robbery* is considered as defined by its mere use and adoption in a law. So if the word *deed*, *will*, *bond*, *note*, &c., as used in this same law, requires any explanation of what Congress meant by their use, we must look to the common law for it." In McCool *vs.* Smith, 1 Black, 459, it was held that a term in use in English law, when employed in a statute without any definition, is to be construed as it is understood in the English law; *e. g.*, "*next of kin*" was held to include only legitimate persons.

It is hardly necessary to cite authorities to prove that the word *negotiable* has received a fixed and determinate meaning in commercial law.

"Negotiable and negotiability signify that an instrument is capable of being transferred so as to be free from any questions between original parties, the quality of being vendible by commercial endorsement."

Abbott's Law Dictionary.

It is necessary to inquire, then, whether there is anything in the act which shows that the legislature did not intend to use the word negotiable in its ordinary legal sense. An examination of the other provisions of the act serves to show that the ordinary meaning of the word was that which the legislature had in view. Thus the act provides that bills of lading and warehouse receipts may be transferred by "*endorsement* and delivery,"

thus using a term applicable solely to the transfer of negotiable instruments. And in the proviso to the first section it is enacted that all warehouse receipts or bills of lading which shall have the word "*not negotiable*" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act—a proviso which would seem to be unmeaning if the object of the act was not to make bills of lading actually negotiable instead of merely assignable, since it must be presumed that the word negotiable is used in the same sense in the proviso as in the body of the section.

Moreover, it should not be assumed that the object of the legislature in passing the act was to impart to bills of lading the quality of assignabillty when they already had that quality by the common law to the fullest extent.

The learned judges in the court below appeared to think that the omission from the Pennsylvania act of the words, "in the same manner as bills of exchange and promissory notes"—which words are found in the Missouri act but not in the Pennsylvania act, was indicative of an intention upon the part of the legislature to limit the meaning of the term *negotiable*.

In many of the States statutes were passed at an early period for the purpose of making promissory notes negotiable instruments. Many of these statutes resembled the Missouri statute in the present case in superadding the words "like bills of exchange." Thus the statute of New York provided that "all notes in writing * * * shall be negotiable in like manner as inland bills of exchange." But in many of the States the statutes omitted all such words. Thus in Virginia the statute enacted that "every promissory note or check for money payable in this state at a particular bank * * and every inland bill of exchange payable in this State, shall be deemed negotiable." Code of Virginia (edition of 1860), page 629.

Yet certainly no one would contend that the omission of the words "like bills of exchange" in some of these statutes rendered promissory notes negotiable in some other sense than bills of exchange were negotiable.

Moreover, in endeavoring to arrive at the meaning of the Pennsylvania statute, no assistance is derived from a comparison of that statute with the statute of Missouri upon the same subject, nor can any significance be attached to the omission of the words "like bills of exchange," &c., from the former statute, since the former statute was passed a year or more before the latter.

There has been no decision of the Supreme Court of Pennsylvania construing the statute in question, but the decision of that court in Henry *vs.* Warehouse Company (*supra*), in which the statute of Louisiana—which is similar to the Pennsylvania statute, except that the former contains the words "in the same manner and to the same effect as bills of exchange and promissory notes"—was held to have made bills of lading issued in that State negotiable, should, as we think, determine the construction of the Pennsylvania statute.

II. The fact that Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft does not invalidate their title—*mala fides* on their part must be shown. In Goodman *vs.* Simonds, 20 Howard, 343, the court below had instructed the jury that if the plaintiff—then endorsee of a bill of exchange—at the time of the endorsement knew such facts and circumstances "as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that said Wallace (the endorser) had no interest in the bill and no authority to use the same for his own benefit," he could not recover. The jury having found for the defendant, the plaintiff took a writ of error to this court, and this court, in reversing the judgment, held that

suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result could be produced only by bad faith on his part.

This doctrine was again laid down in Murray *vs.* Lardner, 2 Wall., 110. In Pennsylvaniain, in the case of Phelan *vs.* Moss, 67 Penna. St. Rep., 59, it was held that a holder of a negotiable note *bona fide* for value without notice can recover upon it, notwithstanding he took it under circumstances which ought to have excited the suspicions of a prudent man. That in order to destroy such holder's title, it must be shown that he took the note *mala fide*.

In the present case, the judge in charging the jury distinctly stated to them that there was no fraud in the transaction; therefore, whether Miller & Brother knew any facts from which they might suspect, or from which there was reason to believe, that Kuhn & Brother had no title, is of no consequence whatever.

III. There was no evidence in the case to warrant the submission to the jury of the question whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

What was supposed by the court below to be evidence on this point has already been referred to.

The fact that one of the members of the firm of Kuhn & Brother had on a former occasion obtained possession of a bill of lading which might have been or ought to have been in the possession of the Farmers' and Mechanics' Bank of Philadelphia, was of itself unimportant in any aspect of the case. The point made, however, was that Mr. Miller knew this fact, and knew also that Kuhn had stolen

the bill. There was no evidence that the bill had been stolen by anybody, and none to show that it had even been *detached* from a draft in Philadelphia. Mr. Lewis, the only witness called by the plaintiffs, said that he did not accuse Kuhn to Mr. Miller of having stolen the bill, and that in fact he (Mr. Lewis) had no personal knowledge as to how Kuhn had got the bill. Kuhn appears to have given his explanation to Mr. Lewis, but that gentleman did not repeat it in his evidence. Mr. Miller was very emphatic in asserting that he had no idea that Kuhn was a thief.

Now, on this state of the case, how could a jury have been justified in finding even that Kuhn had got possession of the bill fraudulently? Who could say that the bill had ever been attached to a draft, or that it had not been detached in St. Louis, as suggested by Mr. Lewis? What evidence was there that Mr. Miller knew that which not only was not proven, but which nobody else ever pretended to know? Kuhn had behaved with apparent honesty to him, in returning the advance as soon as there was any difficulty about the bill of lading; and really it seems impossible to suppose that when Mr. Miller renewed the advance he had even a suspicion that he was dealing with a swindler.

It may be said that he ought to have suspected it. It will be an evil day when innocent even if dull ignorance shall be made equivalent to guilty knowledge.

But if it were admitted that Mr. Miller knew one of the Kuhns had, on a former occasion, improperly detached a bill of lading from a draft, why should the knowledge of that fact have in contemplation of law a tendency to make him believe that he had done the same thing on another occasion? He had dealt largely and for a long time with the Kuhns, and had advanced on many bills of lading which they had not improperly detached from drafts. Why had he not a right to assume that the bill of lading of

November 14th, 1874, had been as honestly obtained as all the others excepting one?

There is no rule of law which requires us to presume that a man who has once been dishonest will always be dishonest.

A single offense does not make the offender *caput lupinum.*

As to the fact that Mr. Miller, after having advanced on the bill of November 14th, telegraphed to the carrying company by which it had been issued, to know whether it was all right, being evidence of his knowledge of some fact or facts from which he had reason to believe that the bill was held as security for the payment of an outstanding draft, there is really nothing to say except that the premises of the argument seem to have no connection with the conclusion.

IV. The court erred in permitting the plaintiffs' counsel to cross-examine Mr. Andrew H. Miller, the defendants' witness, as to transactions connected with the bill of lading of October 27th, 1874. The irrelevancy of this evidence is a question which has already been discussed. The mode in which it was introduced was of itself objectionable. The plaintiffs had no right to prove or introduce their case by a cross-examination not directed to any matter referred to in the examination-in-chief.

V. The court erred in permitting the plaintiffs to introduce in rebuttal of defendants' case the evidence of Mr. John H. Watt as to the mode in which the bill of lading in controversy in this case had got out of the possession of the Bank of North America. Evidence of the fraudulent abstraction of the bill of lading from its rightful owners, if accompanied by evidence of Miller & Brother's knowledge of the fact, would undoubtedly have been competent. But apart from the absence of any evidence of such knowledge on the part of Miller & Brother, the

testimony of Mr. Watt did not tend to rebut anything proved or attempted to be proved by the defendants. It was the duty of the plaintiffs to prove their case at the outset, and if the abstraction of the bill of lading was part of their case it ought then to have been proved. They had no right to withhold their evidence on this point to secure to themselves the advantage of introducing it by way of a pretended rebuttal of the evidence which the defendants had produced. This course is inconsistent with the well-established rules regulating trials of issues, and there was nothing in the circumstances of the present case to justify or excuse such an innovation.

VI. The court erred in admitting the testimony of Mr. Edwin M. Lewis as to the conversation between himself and Mr. Andrew H. Miller about the bill of lading of October 27th, 1874. If the plaintiffs in error have succeeded in satisfying the court that the evidence given by Mr. Lewis was immaterial to the issue, the court certainly erred in admitting it.

VII. The court erred in entering a judgment upon the verdict which found, not the value of the goods which had been replevied, but the value of those which had been eloigned. This was a palpable error, but at the same time it is not pretended that it was anything but the consequence of an unnoticed mistake in entering the verdict. The difficulty, however, is that the record of this suit, as it now stands, shows a judgment relating not to the property in actual controversy, but to property with which the defendants had nothing to do. They therefore have a right to complain of the insufficiency of the record, in not showing their discharge from responsibility for the property which really formed the subject-matters of the controversy.

WILLIAM HENRY LEX,
JAMES E. GOWEN,
For Plaintiffs in Error.

No. 157

Supreme Court of the United States.

HUGH SHAW AND DAVID REESE ESREY,
PLAINTIFFS IN ERROR,

vs.

THE MERCHANTS' NATIONAL BANK OF ST. LOUIS,
DEFENDANT IN ERROR.

PHILADELPHIA
REGISTRATION

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Argument for Defendant in Error.

ROBERT N. WILLSON,
GEORGE JUNKIN,
For Defendant in Error.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

Hugh Shaw and David Reese Esrey, Plaintiffs in Error,

vs.

The Merchants' National Bank of St. Louis, Defendant in Error.

BRIEF FOR THE DEFENDANT IN ERROR.

It is proposed to follow in their order the points made in the brief furnished by the plaintiffs in error.

I. As to whether the law of Missouri or Pennsylvania should govern in determining the rights of the parties in this controversy.

It is not denied that the law of Missouri, the place where the bill of lading was made and first used, should regulate the construction to be put upon its language as between the maker of it and subsequent parties who might acquire an interest in it. Some of the very cases, however, which are cited on the other side, *e. g.*, Scudder *vs.* Bank, 1 Otto (91 U. S.), 406, and Lebel *vs.* Tucker, L. R., 3 Q. B., 77, show clearly that the rule may be quite otherwise as between third parties, whose rights have originated subsequently to the making of the bill, and by contracts independent of the bill, though relative to it, and the merchandise represented by it.

To these cases may be added Hyatt *vs.* Bank of Kentucky, 8 Bush, 193.

We contend that there is a peculiar reason why this distinction in favor of the place of performance, or of originating such independent and derivative rights, should be regarded with reference to such contracts as bills of

lading. Whatever may be their negotiable quality under the laws of different States, and whatever rights the law of the place of making them may give as against the transporter to the original parties shipping goods, such documents are nothing but symbols or representatives of the personal chattels described in them. A valid transfer of the bills is equivalent to a transfer of the chattels. As the law of the place where such property is located would undoubtedly determine the manner in which it could be alienated, no matter where it came from or was owned, so it would seem the law of the same place ought to control the manner in which the ownership might be changed by a transfer of the documentary evidence of title. The principle stated in the cases referred to would not only enable this to be done, but would seem to make it the natural and proper course of action.

The case of Henry *vs.* Warehouse Co., 81 Pa. St. R., 76, is in no way inconsistent with this position, for the reason that the whole transaction involved in the case took place in Louisiana, whose statute was held applicable.

It may not, however, be a matter of much importance in this case to settle the question just mentioned.

The statute of Missouri provides, that bills of lading shall be "negotiable by written endorsement and delivery *in the same manner* as bills of exchange and promissory notes;" and the statute of Pennsylvania directs that they "shall be negotiable, and may be transferred by endorsement and delivery."

Now, while it probably must be conceded that both of these statutes were intended to confer upon such documents some features for the purpose of promoting their easy transmission and use in commercial transactions, different from those existing at common law, it will be noticed that neither of them attempts to place bills of

lading on the same footing *in all respects* as bills of exchange. In this regard these statutes differ from that of Louisiana, for instance, which provides that bills of lading shall be negotiable "to *the same extent*" as such commercial paper. The Missouri law merely says negotiable "in *the same manner*," which refers to the mode of their endorsement and negotiation. It simply means that the endorsee shall have the same rights upon the merchandise as the original shipper and endorser.

The Pennsylvania statute means the same thing. Neither was meant to enact that all the incidents of commercial paper should be attached to bills of lading. Some of these would be strange concomitants or results of transfers of such documents, *e. g.*, the liability of endorsers, demand for delivery, notice of non-delivery, &c.

That such incidents are attached to bills of lading, when the statute is plainly intended to place them on the same footing as bills of exchange, may be seen from the case of Cochran *et al. vs.* Riply *et al.*, 13 Bush, 495.

It may be that these statutes ought to be so construed that a transfer of a bill of lading for value and in entire good faith by one who has been *intrusted* with its custody by the real owner, would be held good. Such a construction might be placed upon either statute without establishing any serious conflict between the law which would regulate the transfer of property in chattels when sold merely as such, and that law which would control the transfer of the same kind of property through the agency of mere symbols. The representative character of such documents, and the careful protection which the law of this country has thrown around the ownership of personal chattels, would seem to make it not only undesirable, but inconsistent with the general policy of the law, for the courts to force a resemblance between bills of lading and bills of exchange. The two classes are essentially different in nature and commercial character. Bills

of exchange have a certain resemblance to money, or bank notes, in commercial usage. Bills of lading, however, are universally regarded and treated as so much cotton, or corn, or some other article of merchandise.

Hale *vs.* Dock Co., 29 Wis., 482.

Rice *vs.* Cutler, 17 Wis., 351.

Am. Note to Lickbarrow *vs.* Mason, 1 Smith's Lead. Cas. (Ed. 1872), 1197, 1198.

There is not the same reason for promoting quick transmissions of title in the one case as in the other.

Indeed, it may be doubted whether the rule of law which protects the title of a holder for value of commercial paper, notwithstanding he may have had strong reason for suspecting fraud in the transfer of the paper to him, has, on the whole, contributed either to business morality or prosperity.

It certainly will be conceded that this legal principle is the very extreme of the peculiar law applicable to what is technically known as commercial paper. If we are correct in the position taken, that bills of lading have not been placed by the statute of either Missouri or Pennsylvania absolutely upon the footing of such paper, we may safely assume that they are not subject to the application of this extreme doctrine.

That such documents are only regarded as *quasi* negotiable paper may be seen from a remark in the opinion in Louisiana Nat. Bank of New Orleans *vs.* Lauveille, 52 Mo., 387.

If there is any difference in the stringency of the two statutes, that of Pennsylvania is the more favorable to the case of the defendant in error, and we have already claimed that the law of that State is only pertinent to be considered in this connection. Holding to this view of the case, we contend that the court below was right in its exposition of the law of the case as to the manner in which the title of the bank to the cotton could be

divested, and especially, as to the infirmity of the title of Miller & Bro., if they took the bill of lading with reasonable ground to believe that it was pledged for the payment of a bill or bills of exchange, which the jury have expressly found. There is no hardship to any honest man in such a principle of law, and it will hardly be argued that a different doctrine should be laid down for the benefit of those who are too stupid or reckless to take warning when they see good grounds for suspicion and distrust.

2. In view of what has been already said, we do not think it necessary to consider the second point made by our opponents at length. It has no pertinence, unless the court shall put the bill of lading in this case on the precise footing of a bill of exchange.

3. We contend that there was abundant evidence to sustain the verdict of the jury that Miller & Bro. knew facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

One most weighty element was found in the manner of the witness Miller, one of the firm mentioned, which, unfortunately, could not well be incorporated in the bill of exceptions, but which the jury had a perfect right to consider. See, for illustration, Record, page 38.

From his testimony it appears that in the early part of 1874 his firm, which advanced largely to Kuhn & Bro. upon bills of lading for cotton, ceased to get *original* bills, except in one or two instances, which they carefully noted in their book as such. In October of 1874, they became aware of a disreputable transaction in which one of the firm of Kuhn & Bro. detached a bill of lading from a draft, and substituted another of different date and amount. Miller & Bro. had advanced on the bill thus

detached, and in connection with the effort made by the bank holding the draft to recover the bill, they were fully advised of the nature of the transaction. Thus learning, if they had not known before, that the original bills of lading for cotton shipped to Kuhn & Bro. were pledged as collaterals for the payment of drafts, when the transaction involving the bill in controversy arose, Miller & Bro. were evidently suspicious, and they seem to have tried to protect themselves against imposition. When they received the bill they entered it in their book "November 14th, for 170 bales," and also wrote "not marked duplicate. N. P. R. R. Co. says it is correct." They also telegraphed to the agent of the line which gave the bill of lading at St. Louis as follows: "Is bill of lading for the 170 bales of cotton shipped November 11th by Norvill & Co. correct? Answer."

The entries in their book and the telegram show that Miller & Bro. had been satisfied by something, and it was probably the transaction of October before referred to, that Kuhn & Bro. had no right to the possession and to make use of the original bills of lading for the cotton; in other words, that those bills were pledged for the payment of drafts. What other explanation can be given for the telegram, for instance? Mr. Miller says that he had no reason to suspect the bill of lading was a forgery. Why did he telegraph, except to ascertain what had become of the draft? Strangely enough, he failed to inquire of the only person whose name was on the bill who could have given him any information. The agent would, of course, know nothing about it.

But all doubt upon this point is removed by the statement of the witness Miller, in an attempted explanation of his telegram and of his sending it to the agent rather than to Norvill & Co., as follows:—"*We did not know what bank the draft came to.*"

Record, page 30.

Upon this point we only desire to add that the fact that Miller & Bro. assumed, took it for granted, even if they did not actually know, that the bill of lading which they received was, in point of fact, collateral to a draft, affects them with bad faith, and in any view of the negotiability of such a bill makes the verdict a proper one.

4. We contend that the court properly allowed the inquiries made of Mr. Miller in cross-examination, as to the transaction relative to the bill of lading of October 27th, 1874. The witness had, by his testimony in chief, endeavored to make out a case of an innocent purchase of the cotton in question without notice of any outstanding title. The cross-examination referred to, was intended to disprove the allegation of good faith out of the witness' own mouth. The materiality of the matter elicited is shown by the manner in which the transaction spoken of influenced the witness' firm in their subsequent dealings relative to bills of lading, as has been referred to.

On this branch of the case, the plaintiffs charged upon Miller & Bro. what was of the nature of fraud, and great liberality has always been allowed in the examination of witnesses, for the purpose of establishing such an allegation, which, from its very nature, relates to matters that the guilty party has not intended to make public.

5. It seems hardly necessary to discuss the question raised by the fifth point of the plaintiffs in error.

The natural and logical order of trial was for the bank to show its title, as originally derived, to the cotton, in the first instance, reserving any testimony to overcome whatever case the defendants below might present, for rebuttal. This course was pursued, and we fail to see any ground for criticism therein. Besides, the order of testimony is largely within the discretion of the court

trying a cause, and the judgment would not be reversed for such an alleged error, even if it existed.

Phila. and T. R. R. Co. *vs.* Simpson, 14 Peters, 445.
Johnston *vs.* Jones, 1 Bl., 209.

6. The same answer may be made to the sixth point as has been made to the fifth.

7. We submit that the mistake of the clerk in entering the verdict ought not to be permitted to affect the judgment. It being conceded to be a mistake, and therefore amendable, it would seem that the court will treat the amendment as having been made, or, at least, allow the record to be returned for the purpose of having it made.

Matheson's Adm'rs *vs.* Grant's Adm'r, 2 How., 263.

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